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BEFORE THE ARIZONA CORPORATION COMMISSION

SUSAN BITTER SMITH, CHAIRMAN

BOB STUMP, COMMISSIONER

BOB BURNS, COMMISSIONER

DOUG LITTLE, COMMISSIONER

TOM FORESE, COMMISSIONER

Arizona Corporation Commission
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IN THE MATTER OF THE APPLICATION OF LIBERTY UTILITIES (BLACK MOUNTAIN SEWER) CORP., AN ARIZONA CORPORATION, FOR AUTHORITY TO ISSUE EVIDENCE OF INDEBTEDNESS IN AN AMOUNT NOT TO EXCEED $3,400,000.	Docket No.: SW-02361A-15-0206
IN THE MATTER OF THE APPLICATION OF LIBERTY UTILITIES (BLACK MOUNTAIN SEWER) CORP., AN ARIZONA CORPORATION, FOR A DETERMINATION OF THE FAIR VALUE OF ITS UTILITY PLANTS AND PROPERTY AND FOR INCREASES IN ITS WASTEWATER RATES AND CHARGES FOR UTILITY SERVICE BASED THEREON.	Docket No.: SW-02361A-15-0207

CP BOULDERS, LLC'S NOTICE OF FILING DIRECT TESTIMONY

CP Boulders, LLC, through its undersigned counsel, hereby provides notice of filing the Direct Testimony of Joseph Yung in the above-referenced matter.

///

DATED this 2nd day of December, 2015.

RYLEY CARLOCK & APPLEWHITE

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Fredric D. Bellamy
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Attorneys for CP Boulders, LLC

ORIGINAL and thirteen (13) copies of the foregoing were filed this 2nd day of December, 2015, with:

Docket Control
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1200 W. Washington Street
Phoenix, AZ 85007

COPY of the foregoing mailed this 2nd day of December, 2015, to:

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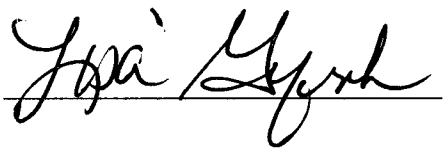

BEFORE THE ARIZONA CORPORATION COMMISSION

SUSAN BITTER SMITH, CHAIRMAN

BOB STUMP, COMMISSIONER

BOB BURNS, COMMISSIONER

DOUG LITTLE, COMMISSIONER

TOM FORESE, COMMISSIONER

IN THE MATTER OF THE APPLICATION OF LIBERTY UTILITIES (BLACK MOUNTAIN SEWER) CORP., AN ARIZONA CORPORATION, FOR AUTHORITY TO ISSUE EVIDENCE OF INDEBTEDNESS IN AN AMOUNT NOT TO EXCEED $3,400,000.	Docket No.: SW-02361A-15-0206
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TESTIMONY

OF

JOSEPH YUNG

December 2, 2015

Executive Summary

Joseph Yung is Vice President of Development for Columbia Sussex Corporation, the Manager of CP Boulders, LLC, an Arizona limited liability company. CP Boulders, LLC acquired ownership of the Boulders Resort and Spa on April 23, 2015. The Boulders Resort offers guest accommodations, a spa, six restaurants and the El Pedregal commercial center. The Boulders Resort is a commercial customer of Liberty Utilities (Black Mountain Sewer Corp.) ("Black Mountain") and purchases treatment plant effluent for use on the Resort's two golf courses.

Mr. Yung testifies on behalf of CP Boulders, LLC, in support of a change in the commercial rate design to be calculated based upon water use.

Mr. Yung further testifies on behalf of CP Boulders, LLC, in support of the multi-party Settlement Agreement resolving contested issues related to the closure of Black Mountain's wastewater treatment plant. Mr. Yung asks the Commission to approve the Settlement Agreement as a fair compromise of disputed issues.

Q. Please state your name, position, and business address.

A. My name is Joseph Yung. I am Vice President of Development for Columbia Sussex Corporation, the Manager of CP Boulders, LLC, an Arizona limited liability company ("CP Boulders"). My business address is 740 Centre View Boulevard, Crestview Hills, Kentucky 41017.

Q. Have you previously testified before the Commission?

A. No.

Q. What is CP Boulders' interest in this case?

A. CP Boulders purchased the Boulders Resort and Spa property (the "Resort") from Wind P1 Mortgage Borrower L.L.C. on April 28, 2015. The Resort is a commercial and effluent customer of Black Mountain. The Resort is a significant commercial customer in that it operates hotel guest accommodations, a spa, six restaurants, two golf courses, and the El Pedregal commercial center. In addition, the Resort purchases effluent from Black Mountain for a portion of the Resort's golf course water supply.

Q. What is the purpose of your testimony?

A. I am testifying as the designated representative of CP Boulders. First, CP Boulders would like to express its support of changes to the existing commercial rate design to more fairly estimate wastewater flows for commercial restaurant users than the current chair-count method. Second, CP Boulders has entered into a Settlement Agreement with Black Mountain, the Town of Carefree, The Boulders Homeowners Association, and Wind P1 Mortgage Borrower L.L.C. regarding closing the wastewater treatment plant. I am testifying in support of that agreement.

Q. Is CP Boulders supporting the new commercial rate design proposed by Black Mountain?

A. It is my understanding the current method used by the company to estimate commercial wastewater flows by chair counts for restaurants is not accurate and can lead to unfairly

high bills, which significantly affects the Resort. CP Boulders agrees it is appropriate in this case to estimate sewer flows for commercial customers based on a more accurate estimate.

Q. Are you familiar generally with the contents of the Commission's prior Decision Nos. 71865 and 73885, issued in Black Mountain's prior rate case?

A. I am familiar generally with the dispute regarding the wastewater treatment plant closure, but I have not studied the details of the prior proceedings in the Commission.

Q. Are you in agreement with the positions taken by Wind P1 Mortgage Borrower L.L.C. in the prior proceedings?

A. In general, yes. I say "in general" because I am generally familiar with what occurred from reviewing various documents since purchasing the Resort, but I have not studied the details. As the successor owner of the Resort, CP Boulders obtained an assignment of the prior owner's rights under the Effluent Delivery Agreement with Black Mountain, and also rights to the ongoing appeal of the Commission's plant closure order. A copy of the Assignment and Assumption of Effluent Delivery Agreement and Related Claims is attached to my testimony as Exhibit A.

Q. Mr. Sorenson, in the testimony submitted with Black Mountain's application in this case, has testified regarding Wind P1 Mortgage Borrower L.L.C.'s prior legal positions and actions regarding the plant closure discussions. Can you describe CP Boulders' position with respect to Mr. Sorenson's testimony on these topics?

A. CP Boulders did not own the Resort property at the times described in Mr. Sorenson's testimony, and I was not involved at that time. For the purposes of background, CP Boulders' position regarding that history is best summarized in the appeal of the Commission's plant closure order that was filed with the Maricopa County Superior Court in Case No. CV2013-007804. A copy of the Complaint filed in that action is attached as Exhibit B to this testimony.

Q. What is the current status of the Resort's appeal case?

A. The Superior Court granted summary judgment in favor of the Commission on August 20, 2014. Wind P1 Mortgage Borrower L.L.C. then appealed the Superior Court's summary judgment decision to the Court of Appeals in case number 1-CA-CV 14-0643. Oral argument is currently scheduled for December 8, 2015. I will not attempt to describe the current status of all the parties' arguments in the appeal, but will just confirm that the dispute is ongoing. I am attaching a copy of the parties' briefs in the appeals court, without the bulky attachments, as Exhibit C to provide the most current description of the dispute.

Q. Has the Resort agreed to settle the appeal case?

A. The Resort has entered into a Settlement Agreement regarding the plant closure, and I understand that a copy of the agreement has been provided to the Commission. The agreement provides that, if the Settlement Agreement is approved by the Commission, then afterward the appeal case will be dismissed.

Q. Why has CP Boulders agreed to the terms in the Settlement Agreement?

A. Most important, the Settlement Agreement is intended to allow the Resort to continue to use effluent produced by the treatment plant at an agreed rate until November 30, 2018. The later date for closure will allow the Resort additional time to adapt its golf course operations for the loss of that water supply.

Q. In the prior rate case, witnesses testified that the Resort needs the effluent produced by Black Mountain's treatment plant to water the golf course. Is that still true?

A. Yes.

Q. Does the Resort support other aspects of the Settlement Agreement?

A. Yes, the Resort has agreed to all of the terms.

Q. Do you believe the Settlement Agreement is in the public interest?

A. Yes, because it reflects a compromise between divergent interests, including the Resort's need for water. The closure costs are significant and will result in higher future rates, but, as opposed to an immediate plant closure, the plan in the Settlement Agreement will allow for a bit more time to implement the closure plan and incur costs.

Q. What would CP Boulders like to see the Commission do with the Settlement Agreement?

A. The Commission should approve the terms as they are written so as not to risk continuation of a very contentious problem.

EXHIBIT "A"

ASSIGNMENT AND ASSUMPTION OF EFFLUENT DELIVERY AGREEMENT AND RELATED CLAIMS

THIS ASSIGNMENT AND ASSUMPTION OF EFFLUENT DELIVERY AGREEMENT AND RELATED CLAIMS (the "Assignment") is made as of the 24 day of April, 2015 among BOULDERS JOINT VENTURE, an Arizona general partnership, WIND P1 MORTGAGE BORROWER L.L.C., a Delaware limited liability company (collectively, Boulders Joint Venture and Wind P1 Mortgage Borrower L.L.C. are referred to herein as "Assignor") and CP BOULDERS, LLC, a Delaware limited liability company ("Assignee").

RECITALS

A. Boulders Joint Venture is a "Party" to that Effluent Delivery Agreement dated as of March 2001, between the Boulders Carefree Sewer Corporation [subsequently named Black Mountain Sewer Corporation, and currently named Liberty Utilities (Black Mountain Sewer) Corp., referred to herein as "Black Mountain"] and Boulders Joint Venture (the "Effluent Delivery Agreement"). Wind P1 Mortgage Borrower L.L.C. is a successor "Party" to Boulders Joint Venture in the Effluent Agreement. For avoidance of doubt regarding the extent of this Assignment, both Boulders Joint Venture and Wind P1 Mortgage Borrower L.L.C. are executing this Assignment as Assignor.

B. Assignor wishes to assign the Effluent Delivery Agreement to Assignee in conjunction with the closing of the sale of the Boulders Resort property to Assignee, effective as of the closing date described in the Agreement of Purchase and Sale between Assignor and Assignee (the "Closing Date"). Pursuant to paragraph 19 of the Effluent Delivery Agreement, Assignor may assign its interest in the Effluent Delivery Agreement without the consent of the other Parties.

C. Assignor has certain appeal rights, causes of action, and claims for damages against the Arizona Corporation Commission and its Commissioners, and Black Mountain, including an administrative appeal that is currently proceeding in Arizona Court of Appeals docket number CA-CV 14-0643 (such administrative appeal and all rights related thereto, the "Appeal"), a related special action case filing in Maricopa County Superior Court case number LC-2013 000371, and a claim for breach of contract and related damages arising out of Black Mountain's actions and inactions contributing to the Arizona Corporation Commission's order to close the Boulders East Plant (as defined in the Effluent Delivery Agreement). Except as provided in this Assignment, Assignor wishes to assign all of its appeal rights, causes of action, and claims for damages to Assignee.

D. As provided in paragraph 19 of the Effluent Delivery Agreement, Assignee wishes to assume all obligations of the Assignor in the Effluent Delivery Agreement from the Closing Date forward.

AGREEMENT

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are acknowledged, Assignor and Assignee agree as set forth below.

1. Recitals. The Recitals are hereby incorporated into this Assignment and made a part hereof.

2. Assignment. Effective as of the Closing Date (the "Effective Date"), Assignor assigns, conveys and transfers to Assignee all of Assignor's right, title, and interest in, to, under and with respect to the Effluent Delivery Agreement. Except as provided in Paragraphs 3 and 4 below, as of the Effective Date, Assignor assigns, any and all of Assignor's rights in the Appeal, and any and all claims, demands, and causes of action that Assignor may have against the Arizona Corporation Commission and Commissioners, and Black Mountain, relating to the Effluent Delivery Agreement.

3. Exception to Assignment – Pre-Closing Attorneys' Fees. Assignor retains and does not assign its right to receive court-awarded attorneys' fees and costs related to the administrative appeal of the Arizona Corporation Commission's plant closure order and the related Appeal relating to fees and costs incurred by Assignor prior to the Closing Date. Assignor authorizes Ryley Carlock & Applewhite attorneys to prepare proof of such fees and expenses to support Assignor's claim for such pre-Closing fees and costs.

4. Exception to Assignment – Appeal Rights. Assignor retains and does not assign its rights to pursue the Appeal, but only to the extent that any portion of this Assignment would otherwise destroy the Arizona courts' statutory jurisdiction to continue to consider Assignor's full administrative appeal of the Arizona Corporation Commission's plant closure order. Assignor's retention of rights pursuant to this paragraph 4 will extend only so long as Assignee desires to pursue the Appeal and any related subsequent court proceedings such as remands and further appeals. Notwithstanding Assignor's retention of the rights in this paragraph 4, after the Closing Date, Assignor will be a nominal party and shall have no obligation to actively participate in the Appeal, and Assignee shall bear all risk, responsibility, obligations, and expenses related to such proceedings.

5. Assumption. Beginning on the Effective Date, Assignee assumes each and all of Assignor's right, title and interest in, to, under and with respect to the effluent Delivery Agreement and all obligations thereunder to the extent accruing on or after the date hereof.

6. Counterparts. This Assignment may be executed in counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same instrument.

7. Governing Law and Venue. This Assignment shall be construed and interpreted according to Arizona law. Any proceedings regarding this Assignment shall be brought in Maricopa County, Arizona.

8. Further Actions. Assignor and Assignee agree to promptly take such further actions reasonably required to put into effect and document the assignments and assumption in this Assignment. In addition, Assignor agrees to reasonably cooperate with Assignee, as reasonably requested by Assignee from time to time, in the Appeal and all actions related thereto at no cost or expense to Assignor.

[signature pages follow]

IN WITNESS WHEREOF, Assignor and Assignee have executed this Assignment and Assumption of Effluent Water Delivery Agreement and Related Claims as of the date set forth above.

ASSIGNOR:

BOULDERS JOINT VENTURE, an Arizona general partnership

By: **BRE/Wind Inactive Companies L.L.C.**, its sole managing partner

By: **BRE/Wind Hotels Holdings II L.L.C.**, its sole member

By: **New Wind Parent L.L.C.**, its sole member

By: _____

Name: Amy Lancaster

Title: Vice President

[Additional signature page follows]

[Counterpart signature page to Assignment and Assumption of Effluent Water Delivery Agreement and Related Claims]

ASSIGNOR:

WIND P1 MORTGAGE BORROWER L.L.C., a Delaware limited liability company

By: _____

Name: Glenn Alba

Title: Managing Director and Vice President

[Additional signature page follows]

[counterpart signature page to Assignment and Assumption of Effluent Delivery Agreement and Related Claims]

ASSIGNEE:

CP BOULDERS, LLC, a Delaware limited liability company

By: _____

Name: CHRISTOPHER J. BALLAD

Its: CFO

KTBH: 4845-5099-8563, v. 2

EXHIBIT "B"

COPY

MAY 31 2013

COURT SEAL

MICHAEL K. JEANES, CLERK
M. DE LA CRUZ
DEPUTY CLERK

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Wind P1 Mortgage Borrower, L.L.C.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

CV2013-007804

WIND P1 MORTGAGE BORROWER, L.L.C., a Delaware limited liability company

Plaintiff,

v.

THE ARIZONA CORPORATION COMMISSION, an agency of the State of Arizona; BLACK MOUNTAIN SEWER CORPORATION, an Arizona corporation; THE BOULDERS HOMEOWNERS ASSOCIATION, an Arizona non-profit corporation; RESIDENTIAL UTILITY CONSUMER OFFICE, an agency of the State of Arizona; TOWN OF CAREFREE, an Arizona municipal corporation; DENNIS E. DOELLE, an individual; and M.M. SHIRTZINGER, an individual;

Defendants.

Case No. _____

COMPLAINT

(Unclassified Civil; Priority Case – A.R.S. § 40-255)

For its Complaint, Plaintiff Wind P1 Mortgage Borrower, L.L.C. ("Wind P1" or the "Resort") alleges as follows:

PARTIES, JURISDICTION, VENUE

1. Plaintiff Wind P1 is a Delaware limited liability company authorized to do business in the State of Arizona.

2. Defendant Arizona Corporation Commission (the "ACC" or the "Commission") is an agency of the State of Arizona as defined in the Arizona Constitution, Article XV, and A.R.S. § 41-1001(1). The Commission is a five-member publicly elected body.

3. The Commission's principal offices are in Maricopa County, Arizona.

4. Defendant Black Mountain Sewer Corporation, an Arizona corporation ("Black Mountain"), is a privately-owned public service corporation that provides wastewater collection and treatment services in an area that includes a portion of the Town of Carefree, Arizona. Black Mountain was a party to the administrative action that is appealed in this Complaint.

5. Defendant The Boulders Homeowners Association, an Arizona non-profit corporation ("BHOA"), was a party to the administrative action this is appealed in this Complaint.

6. Defendant Residential Utility Consumer Office ("RUCO"), an agency of the State of Arizona, was a party to the administrative action that is appealed in this Complaint.

7. Defendant Town of Carefree is an Arizona municipal corporation that was a party to the administrative action that is appealed in this Complaint.

8. Defendant Dennis E. Doelle, an individual, was a party to the administrative action that is appealed in this Complaint.

9. Defendant M. M. Shirtzinger, an individual, was a party to the administrative action that is appealed in this Complaint.

10. The Commission's and its members' actions that are the subject of this Complaint occurred in Maricopa County, Arizona.

11. Jurisdiction and venue are proper in this Court pursuant to A.R.S. § 40-254(A).

GENERAL ALLEGATIONS

12. Black Mountain currently provides wastewater collection and treatment services to approximately 2100 customer connections in a service area that includes residential and commercial properties in the Town of Carefree.

13. BMSC owns, operates, and maintains a wastewater treatment plant (the "WWTP") located near the Boulders Resort property.

14. Wind P1 owns the Boulders Resort, a world-class resort that includes a hotel and two 18-hole golf courses.

15. Wind P1 is a wastewater customer of Black Mountain.

16. Wind P1 also purchases treated wastewater (effluent) produced by the WWTP from Black Mountain pursuant to the Effluent Delivery Agreement dated March 2001, a true and correct copy of which is attached to this Complaint as **Exhibit A**.

17. The Effluent Delivery Agreement is currently in effect, and the initial term ends March 2021.

18. Wind P1 relies on the effluent purchased from WWTP to water turf and other landscaping at its two golf courses within the Boulders Resort property, especially at peak water use times when Wind P1's other reclaimed water source from the City of Scottsdale is insufficient.

19. Wind P1 is not able currently to purchase more reclaimed water from Scottsdale's Reclaimed Water Delivery System because other users have rights to all available capacity.

20. Wind P1's golf courses must be maintained in very good condition in order to attract and retain customers because Wind P1 competes with resort destinations locally, nationally, and internationally.

21. The WWTP through which effluent is delivered to Wind P1 has been operating in its present location for over 40 years.

22. The WWTP was constructed to provide water to the Resort golf courses. The WWTP parcel was platted as part of a Boulders subdivision titled "The Boulders Carefree Unit Four Phase One."

23. Houses located closest to the WWTP were constructed in the early 1970s and early 1980s.

24. During all times relevant to this matter, the WWTP has been operated in accordance with applicable law, permit provisions, and industry standards.

2005 ACC Rate Case Addressed Odors from Black Mountain's Collection System

25. On September 16, 2005, Defendant Black Mountain filed an application for a utility rate increase with the ACC (the "2005 rate case"). Odor complaints were made by Black Mountain's customers during the 2005 rate case.

26. Evidence cited in the final decision for the 2005 rate case, ACC Decision No. 69164, included an engineering study by Lamb Technical Services, Inc. that concluded odors were caused by the presence of hydrogen sulfide in Black Mountain's collection system pipes and force mains, and that turbulence and negative pressure in the piping system pushed the gas out of openings such as manhole cover pickholes and vent stacks, causing odors.

27. Black Mountain agreed during the 2005 rate case to remove the troublesome Carefree Inn Estates ("CIE") lift station, and the Commission further ordered Black Mountain to adopt one of two engineer-recommended design changes to Black Mountain's collection system. The Commission ordered no changes to the WWTP.

Black Mountain Addressed Odors after 2005 Rate Case

28. During and after the 2005 rate case, Black Mountain asserted that it complied with the Commission's order in ACC Decision No. 69164, and made a number of additional improvements to its system and operations that Black Mountain believed further reduced odors emitted by both the collection system and the WWTP.

2008 Rate Case – Settlement Agreement

29. On December 19, 2008, Defendant Black Mountain filed another application for a utility rate increase with the Commission, Commission docket number SW-02361A-08-0609 (the "2008 rate case"), that resulted initially in Commission Decision No. 71865. Two hearings were conducted in the 2008 rate case docket, and two formal decisions were issued, Decision Nos. 71865 and 73885. The parties have referred to the initial 2008 fair value determination/rate hearing process that culminated in Decision No. 71865 as "Phase 1" of the 2008 rate case.

30. All of the Defendants named in this Complaint were each admitted by the Commission as parties to Phase 1 of the 2008 rate case, and there were no parties admitted other than the Defendants.

31. Wind P1 was not a party during Phase 1 of the 2008 rate case.

32. BHOA asserted in Phase 1 of the 2008 rate case that resident complaints indicated that, although the 2005 rate case concluded odor problems were primarily caused by Black Mountain's collection system, the BHOA was now certain Black Mountain's WWTP was emitting unacceptable noises and odors.

33. Prior to the Commission's resolution of Phase 1, two parties, Black Mountain and the BHOA, entered into a voluntary settlement agreement, the Wastewater Treatment Plant Closure Agreement (the "Closure Agreement," attached hereto as Exhibit B). In the Closure Agreement, Black Mountain promised to close the WWTP subject to certain conditions precedent. One of the conditions precedent required that Black Mountain obtain the Commission's approval of a surcharge that would allow Black Mountain to recover through its rates at least some of the costs of closing the WWTP prior to its next rate case.

34. Another condition precedent to the Closure Agreement required as follows:

> [Black Mountain] currently has an agreement with the Resort which requires [Black Mountain] to deliver all effluent generated at the Plant to the Resort through March 2021. In the agreement, BMSC

> covenanted to continue to operate the Plant and to not reduce the amount of effluent produced by the Plant. [Black Mountain] must sign an agreement with the Resort whereby the Resort agrees to allow the termination of the Effluent Agreement at no or limited cost to [Black Mountain].

35. Defendant BHOA agreed to all of the conditions precedent in the Closure Agreement.

36. No Defendants other than Black Mountain and BHOA were parties to the voluntary Closure Agreement.

37. Black Mountain and BHOA both requested during Phase 1 that the Commission approve the proposed surcharge mechanism described in the Closure Agreement to fund closure of the WWTP, and the Commission approved the surcharge in Commission Decision No. 71865 on August 31, 2010. Decision No. 71865 is attached to this Complaint as Exhibit C.

38. The Commission did not order closure of the WWTP, or any other changes to the WWTP, in Decision No. 71865. A decision to close a wastewater reclamation plant is typically a management decision reserved to a public service corporation's management.

39. The Commission found in Phase 1 that the WWTP is used and useful in the provision of treatment services to customers, and included the WWTP in Black Mountain's rate base.

BHOA Moves for Closure Prior to Satisfaction of Conditions to Settlement Agreement

40. Before satisfaction of all the remaining conditions precedent to the Closure Agreement occurred, on June 15, 2011, BHOA filed a motion requesting that the Commission order the plant closed to relieve Black Mountain of its contractual commitment to deliver effluent to the Resort. The purpose of BHOA's motion was to obtain a Commission order forcing closure of the WWTP to render moot a condition precedent to the Closure Agreement at little or no cost to Black Mountain, and subsequently at little or no cost to BHOA.

41. The Resort moved to intervene in the rate case on July 7, 2011, and was granted intervention on January 26, 2012.

42. The Commission decided to reopen the Phase 1 rate case decision, Decision No. 71865, pursuant to A.R.S. § 40-252, to address the BHOA's motion to order closure of the WWTP. The parties have referred to the hearing process following this reopening as "Phase 2" of the 2008 rate case.

43. A Phase 2 hearing was held May 8, 2012. The only parties that participated or offered evidence in the Phase 2 hearing were BHOA, Black Mountain, Wind P1, and the Commission Staff. RUCO, the Town of Carefree, and the individual parties admitted during Phase 1 did not participate in Phase 2.

Lack of Evidence of Noise or Odor Levels Attributable to Plant Operation

44. In the Phase 2 hearing, BHOA offered no new witnesses in support of its motion for closure of the WWTP. BHOA instead offered stipulated facts regarding the mere existence of complaints about perceived odor and noise that residents attributed to the WWTP.

45. The only engineering testimony offered in either the Phase 1 hearing conducted on November 18, 23, 24, and 25, or the Phase 2 hearing conducted on May 8, 2012 regarding the design, construction, operation, or maintenance of the WWTP was the testimony of one witness – Commission staff engineer Dorothy Hains – during the Phase 1 hearing. Ms. Hains reviewed the WWTP as part of her routine engineering review of all Black Mountain's plant property. Ms. Hains did not recommend closure of the WWTP to address the odor or noise issues noted in public comments.

46. The Commission in its decisions in Phase 1 (Decision No. 71865) and Phase 2 (Decision No. 73885, attached as Exhibit D) of the rate case found no unreasonable defect in the design of the WWTP.

47. The Commission in its decisions in Phase 1 and Phase 2 of the rate case found no unreasonable defect in the operation of the WWTP.

48. The Commission in its decisions in Phase 1 and Phase 2 of the rate case found no unreasonable defect in the maintenance of the WWTP.

49. The Commission found that the WWTP is operated in full compliance will all applicable law and industry standards, including applicable rules of the Commission, Arizona Department of Environmental Quality, and Maricopa County.

50. The Commission found that BMSC has taken steps to minimize odors and noises from the operation of the WWTP, including installation of an odor scrubber.

51. No evidence was offered or admitted in either Phase 1 or Phase 2 of the 2008 rate case that indicates any health or safety danger in the continued operation of the WWTP at its present location.

52. No evidence was offered or admitted in either Phase 1 or Phase 2 of the 2008 rate case that Black Mountain's wastewater collection services are unsafe, unsatisfactory, or non-continuous.

53. The Commission did not measure noise and odor levels in the vicinity of the WWTP or elsewhere, nor did any party offer such measurements into evidence to support a closure order.

54. The Commission conducted no technical investigation by qualified professionals to determine the source or strength of odors and noises that were the subject of customer complaints, nor did any party offer such measurement to support an order of closure.

55. No odor or noise studies conducted by a qualified technical professional were offered into evidence by any party during either Phase 1 or Phase 2 of the 2008 rate case.

56. Despite having insufficient evidence to determine the source and strength of either odors or noises attributable to the WWTP as needed to determine whether the continued operation of the WWTP reasonably complies with a recommended or required noise or odor standard, the Commission ordered closure of the WWTP in Decision No. 73885 based upon speculation and unsworn public comments requesting closure.

COUNT 1

(Preliminary Injunction; Injunction; A.R.S. §§ 12-1801, 40-254)

57. Wind P1 incorporates the foregoing allegations as if they were fully set forth herein.

58. Closure of the WWTP as a result of the Commission's unlawful and unreasonable order in Decision No. 73885, described in paragraphs 44 through 56 above, will cause Wind P1 material and irreparable damage because closure will cut off Wind P1's water supply from the WWTP. Loss of the WWTP water supply will likely result in the loss of or damage to valuable golf course turf and other water-dependent landscaping, related lost business from customers expecting a world-class golf experience, and irreparable loss of business reputation.

59. Black Mountain's relinquishment of the Aquifer Protection Permit, air quality permit(s) and other entitlements for the WWTP, and the physical closure of the WWTP, prior to the conclusion of this appeal will likely render Wind P1's right to an appeal in this case ineffective because, once the WWTP is closed, it will likely not be possible to re-permit, re-entitle, and re-construct the WWTP in the same location due to new, more restrictive permit and construction requirements.

60. Grant of an injunction preliminarily setting aside the Arizona Corporation Commission's Decision No. 73885 in accordance with A.R.S. § 40-254(A), and prohibiting Black Mountain from closing the WWTP during the pendency of the appeal process, will maintain the status quo for a WWTP that has been operating lawfully and in compliance with permit requirements in the same location for over 40 years.

61. Wind P1 has no other adequate remedy at law to stop Black Mountain from closing the WWTP before Wind P1's appeal is heard by this Court.

62. A.R.S. § 40-254 recognizes the Court may grant an injunction to enjoin actions of the Commission that are unlawful or exceed the Commission's authority.

63. Pursuant to A.R.S. §§ 12-1801, 40-254, and pursuant to the principles of equity, the Commission and Black Mountain should be enjoined from taking any action to relinquish permits or physically close the WWTP during the pendency of this appeal.

COUNT 2

(Decision Unreasonable and Unlawful; Lack of Substantial Evidence: Ariz. Const. Art. 15, §3; A.R.S. 40-254)

64. Wind P1 incorporates the foregoing allegations as if they were fully set forth herein.

65. The Commission failed to accurately or reliably measure the level of existing utility service provided by Black Mountain to customers.

66. The Commission failed to identify a required or recommended standard of design, operation, or maintenance of wastewater reclamation plants that was reasonable, and then compare evidence regarding the WWTP to the recommended standard to determine if continued use of the WWTP was reasonable.

67. The Commission failed to compare the costs of WWTP closure to the costs of other potential remedies.

68. The Commission unreasonably relied upon, in violation of its own rules and in violation of principles of basic due process, unverified, unsubstantiated, unqualified, unreliable, and un-admitted public comments and form letters. The Commission's decision violates A.R.S. § 41-1062(A) (evidence must be substantial, reliable, probative, and parties shall have right of cross-examination) and Arizona Administrative Code rules R14-3-104(A) (right of cross-examination), R14-3-109(F) (testimony must be under oath), (N) (municipal resolutions must be properly authenticated and offered by proper person at hearing; are subject to rebuttal), and R14-3-105(C) (consumers may make a statement on his or her own behalf but are not deemed a party to the proceedings).

69. The Commission had insufficient evidence to support the Commission's decision to force closure of the WWTP as ordered in Decision No. 73885.

COUNT 3

(Decision Violates Commission Rule Regarding Sufficiency of Sewer Facilities and Service; A.A.C. R14-2-607)

70. Wind P1 incorporates the foregoing allegations as if they were fully set forth herein.

71. The Commission in its Decision No. 73885 failed to follow its own rule regarding the level of service and adequacy of plant provided by a sewer utility.

72. The Commission made no finding that existing collection and treatment services provided by Black Mountain were unsafe, unsatisfactory, or non-continuous.

73. The Commission made no finding that the WWTP violated any applicable requirement of ADEQ or any other governmental agency having jurisdiction over such facilities.

74. The Commission failed to follow its own rule, Arizona Administrative Code R14-2-607, by ordering closure of the WWTP when the WWTP met the Commission's requirements for such facilities and service.

COUNT 4

(Violation of United States Constitution, Art. I, and Arizona Constitution, Art. 2, Sec. 25 – Contract Impairment)

75. Wind P1 incorporates the foregoing allegations as if they were fully set forth herein.

76. Commission Decision No. 73885 substantially impairs Wind P1's contractual right to effluent delivery pursuant to the Effluent Delivery Agreement because the closure of the WWTP will end deliveries.

77. The Commission failed to identify a significant and legitimate purpose for the contractual impairment because it found the WWTP is in compliance with all laws and industry standards.

78. The Commission's Decision No. 73885 contains an unreasonable condition to close the WWTP and end effluent deliveries to Wind P1 altogether that is not necessary to meet an important general social problem.

COUNT 5

(Violation of United States Constitution, Amendment 14, and Arizona Constitution, Art. 2, Sec. 4 – Due Process)

79. Wind P1 incorporates the foregoing allegations as if they were fully set forth herein.

80. The Commission's Decision No. 73885 lacks sufficient evidence of causation, harm, a reasonable standard of harm, and comparative costs of remedies to support the reasonableness of an order to close the WWTP.

81. The Commission considered and relied upon public comments made outside the Commission's hearing process and, even after timely objections were made, failed to allow Wind P1 the right to cross-examine the witnesses providing such comments.

82. The Commission's Decision No. 73885 violates Wind P1's and the public's right to due process in violation of law.

PRAYER FOR RELIEF

WHEREFORE, Wind P1 prays for judgment on its claims against the Commission as follows:

A. Enjoining the Commission and Black Mountain from taking any action to relinquish permits or physically close the WWTP as a result of Commission Decision No. 73885 prior to the resolution of this appeal.

B. Vacating, setting aside, and reversing Commission Decision No. 73885 as unlawful and unreasonable under Arizona Constitution, Article 15, section 3.

C. Vacating, setting aside, and reversing Commission Decision No. 73885 as unlawful and unreasonable under A.R.S. section 40-254 and the statutes and rules cited in this Complaint.

D. Vacating, setting aside, and reversing Commission Decision No. 73885 as unconstitutional for unjustified and undue interference with a private contract.

E. Vacating, setting aside, and reversing Commission Decision No. 73885 as unconstitutional for violating due process.

F. Awarding Wind P1 its taxable costs and attorneys' fees incurred in bringing this action, pursuant to A.R.S. § 12-348 and other applicable statutes.

G. Awarding such further relief as the Court deems just and proper.

Transcripts will be designated as part of the record pursuant to A.R.S. § 12-904(B)(5).

DATED this 31st day of May, 2013.

RYLEY CARLOCK & APPLEWHITE

By

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EXHIBIT "C"

COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

WIND P1 MORTGAGE BORROWER L.L.C., a Delaware limited liability company, Plaintiff/Appellant, v. ARIZONA CORPORATION COMMISSION, an agency of the State of Arizona; BLACK MOUNTAIN SEWER CORPORATION, an Arizona corporation; TOWN OF CAREFREE, an Arizona municipal corporation, Defendants/Appellees.	Court of Appeals Division One No. 1 CA-CV 14-0643 Maricopa County Superior Court No. CV2013-007804
THE BOULDERS HOMEOWNERS ASSOCIATION, an Arizona non-profit corporation, Intervenor/Appellee.	

APPELLANT WIND P1 MORTGAGE BORROWER L.L.C.'S OPENING BRIEF

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INTRODUCTION

The Arizona Corporation Commission (the "Commission" or "ACC") regulates public service corporation rates charged to consumers and certain other matters as specified in Arizona Constitution Article XV and Arizona Revised Statutes Title 40. In this case, in response to a request submitted by the Boulders Homeowners Association ("BHOA"), in an unprecedented action, the Commission ordered a public service corporation, Black Mountain Sewer Corporation ("BMSC"), to close an operating wastewater treatment plant (the "Plant" or "WWTP"), even though the plant meets all industry and legal standards, to remediate alleged nuisance conditions on non-utility properties.

Plaintiff-Appellant, Wind P1 Mortgage Borrower L.L.C. ("Wind P1"), owns two golf courses adjacent to the WWTP property. Wind P1 purchases effluent produced by the WWTP for landscape watering pursuant to a contract between Wind P1 and BMSC, the Effluent Delivery Agreement. Closure of the WWTP will substantially impair the Effluent Delivery Agreement, harming Wind P1 by cutting off a critical golf course water supply.

This case arises out of Wind P1's challenge of the Commission's plant closure order, Commission Decision No. 73885 (the "Decision"). Wind P1 challenged the Commission Decision in Superior Court as "unlawful" and "unreasonable" under A.R.S. § 40-254, and as an unconstitutional contract

impairment and violation of due process. The Commission's plant closure order in this case was in the nature of a political zoning decision, and was not an authorized administrative agency enforcement action.

The Superior Court, applying the wrong standard of review, erroneously granted the Commission's Cross-Motion for Summary Judgment prior to a trial, and entered final judgment. This case is Wind P1's appeal of the Superior Court's legal conclusions and grant of the Commission's Cross-Motion for Summary Judgment.

STATEMENT OF THE CASE

I. COMMISSION PROCEDURAL HISTORY

On December 19, 2008, BMSC filed a rate case that concluded in Commission Decision No. 71865, issued on September 1, 2010. *See* Index of Record docketed October 3, 2014, document number 140 ("I.R. 140"), ¶16; I.R. 142, Ex. 10. The evidentiary hearings in the 2008 rate case occurred on November 18, 23, 24, and 25, 2009.

After the final decision in the rate case, on June 15, 2011, BHOA filed a motion with the Commission in the same docket, requesting that the Commission issue an order to BMSC to close the WWTP. I.R. 140, ¶26; I.R. 141, Ex. 3. The Commission decided to reopen the matter to consider BHOA's motion. Wind P1

was granted intervention by the Commission's hearing officer on January 6, 2012. I.R. 140, ¶28; I.R. 141, Ex. 3.

The Commission's hearing officer held a hearing on May 8, 2012, followed by briefing by the parties, and issuance of a recommended opinion and order. I.R. 140, ¶29; I.R. 141, Ex. 3. Wind P1 then filed exceptions to the hearing officer's recommended opinion and order, and a motion to strike un-admitted public comments from the recommended opinion and order. I.R. 140, ¶30; I.R. 143, Ex. 16, 17. The Commission's final Decision No. 73885 (containing the plant closure order) was issued on May 8, 2013. I.R. 141, Ex. 3.

Wind P1 timely requested a Commission rehearing on May 10, 2013, and the rehearing was denied by operation of law 20 days later under A.R.S. § 40-253(A). I.R. 143, Ex. 18.

II. SUPERIOR COURT PROCEDURAL HISTORY

A. Appeals to Both Superior Court and Court of Appeals

Wind P1 timely filed an action in the Superior Court on May 31, 2013 pursuant to A.R.S. § 40-254(A). I.R. 1. Concurrent with the Complaint, Wind P1 filed a Motion for Preliminary Injunction to stay the Commission's Decision

pending appeal,[1] but the motion was rendered moot by the Superior Court's summary judgment ruling.

In response to the Commission's argument in its Answer that the Superior Court lacked jurisdiction due to the nature of the Plant closure order as "ratemaking," Wind P1 later timely filed a parallel direct appeal to this Court of Appeals per A.R.S. § 40-254.01. I.R. 140, ¶¶31, 32; I.R. 143, Ex. 19.

On August 26, 2013, this Court in case number 1 CA-CC 13-0001 issued an order finding that it had no jurisdiction over Wind P1's direct appeal because "Decision No. 73885 did not arise from a process involving rate making or rate design..." I.R. 143, Ex. 19. The Court of Appeals order confirmed the action was properly brought in Superior Court under A.R.S. § 40-254.

B. <u>Summary Judgment Motions Made in Superior Court</u>

On December 18, 2013, Wind P1 filed motions for partial summary judgment on Counts 2, 3, 4, and 5 of its Complaint.[2] I.R. 139-44. On February 7, 2014, the Commission and BMSC both responded and filed Cross-Motions for

[1] Because the availability of interlocutory relief was uncertain under the provision in A.R.S. § 40-254(F), Wind P1 also filed parallel special action requests for interlocutory relief in the Supreme Court (No. CV-13-0236-SA) and Superior Court (No. LC2013-000371). The Supreme Court declined to take jurisdiction, and the parties stipulated to stay the Superior Court special action, pending in front of the same judge considering the Motion for Preliminary Injunction in the present case.

[2] Count 1 was a request for a Preliminary Injunction to stay the Commission's Decision.

Summary Judgment. I.R. 150-53, 155-70. The Court heard oral arguments on the summary judgment motions on April 1, 2014,[3] and docketed a written ruling on June 2, 2014 (the "Ruling"). I.R. 197. A final judgment was entered in the case on August 22, 2014, and certified on September 23, 2014. I.R. 205, 212. Wind P1 filed a Notice of Appeal in the Superior Court on August 26, 2014. I.R. 206.

STATEMENT OF FACTS

III. FACTUAL BACKGROUND

BMSC is a privately-owned public service corporation that owns and operates the WWTP located near two Boulders Resort golf courses owned by Wind P1. I.R. 140, ¶1. The WWTP has been located in the same location near homes in the Boulders community for over 40 years. I.R. 140, ¶3. Houses closest to the WWTP were constructed in the early 1970s and early 1980s. *Id.*

Wind P1 purchases treated wastewater (effluent) produced by the WWTP from BMSC pursuant to the Effluent Delivery Agreement dated March 2001 ("Effluent Agreement"). I.R. 140, ¶4; I.R. 141, Ex. 5. The Effluent Agreement's initial term ends March 2021. I.R. 140, ¶5; I.R. 141, Ex. 5. Wind P1 obtains approximately 15 percent of its total irrigation water from the WWTP, and relies on the effluent from the WWTP for at least six months each year during peak water use times. I.R. 140, ¶6. Without the effluent, Wind P1 would have to leave one or

[3] A transcript of the oral argument was docketed in this matter on October 24, 2014.

both courses brown for several months each winter, and the lack of sufficient water may harm re-establishment of summer grass. *Id.*

In addition to serving local residents, the Boulders Resort owned by Wind P1 is a destination golf resort for tourists. I.R. 140, ¶7. Many visitors come for the primary purpose of golfing. *Id.* Both of the Resort's golf courses are world-class courses that are designed and operated to compete with courses at other luxury properties, both in the United States and internationally. *Id.* If the Resort is not able to maintain the golf courses in world-class condition, it will have a negative impact on the Resort's ability to continue attracting visitors and golf club members. I.R. 140, ¶8.

A. History of 2005 Rate Case – Collection System Odors

On September 16, 2005, BMSC filed an application for a utility rate increase with the Commission (the "2005 rate case"). I.R. 140, ¶9. Odor and noise complaints were made during the 2005 rate case, and engineering studies and testimony as well as the Commission's findings indicated odors were coming from various points in BMSC's sewer collection system of pipes, manholes, and lift stations. I.R. 140, ¶¶10, 11, 12. BMSC made improvements to its sewer collection system and also to the WWTP (including installation of an odor scrubber) after the 2005 rate case to address odors and noises. I.R. 140, ¶¶14, 15. The measures

successfully reduced odors and noises in the collection system leading to the plant and at the plant itself. I.R. 140, ¶15.

B. Settlement Agreement between BMSC and BHOA in 2008 Rate Case

On December 19, 2008, BMSC filed a new rate case that concluded in Commission Decision No. 71865, issued on September 1, 2010 (the "2008 rate case"). I.R. 140, ¶16. During the 2008 rate case, BHOA and BMSC entered into a two-party settlement agreement,[4] the Wastewater Treatment Plant Closure Agreement ("Closure Agreement"), in which BMSC promised to BHOA that BMSC would close the WWTP subject to a number of conditions precedent. I.R. 140, ¶17; I.R. 143, Ex. 12. One of the conditions precedent in the Closure Agreement provides, in pertinent part:

> Effluent Agreement with the Resort. BMSC currently has an agreement with the Resort which requires BMSC to deliver all effluent generated at the Plant to the Resort through March 2021. In the agreement, BMSC covenanted to continue to operate the Plant and to not reduce the amount of effluent produced by the Plant. BMSC must sign an agreement with the Resort whereby the Resort agrees to allow the termination of the Effluent Agreement at no or limited cost to BMSC.

I.R. 140, ¶19, Ex. 12. In support of BHOA's request that the Commission adopt certain of the Closure Agreement terms, BHOA offered one lay witness, Les Peterson, who testified that it was now clear to BHOA that the odors experienced

[4] Wind P1 was not a party to the 2008 rate case. The Commission Staff and other parties to the Commission's case at that time did not sign the Closure Agreement.

by Boulders residents were caused not only by the collection system, but also by the WWTP. I.R. 140, ¶21. Peterson asserted that, although the frequency of odors was reduced after improvements, odors continued to be "very noticeable" and "objectionable" to residents. *Id.*

No engineering testimony was offered in support of the Closure Agreement other than the Commission's staff engineer's responses to questions following a routine plant infrastructure review indicating she was unsure if WWTP closure would resolve customer odor concerns and recommending further study. I.R. 140, ¶22; I.R. 143, Ex. 15. The Commission's engineer did not recommend closure of the WWTP. I.R. 140, ¶23; I.R. 143, Ex. 15. The Commission did not order closure of the WWTP in the 2008 rate case; rather, the Commission found the WWTP was used and was useful in service to customers, and included the plant in BMSC's rate base. I.R. 140, ¶24. A decision to close a plant is typically a decision reserved to a public service corporation's management. I.R. 140, ¶25.

C. After 2008 Rate Case, BHOA Moves for Plant Closure Order

After the 2008 rate case concluded, on June 15, 2011, BHOA filed a motion requesting that the Commission order the WWTP closed despite BMSC's failure to achieve a voluntary release of its contractual obligations to deliver effluent to Wind P1. I.R. 140, ¶26; I.R. 143, Ex. 23. BHOA's motion was directed to a provision in the Effluent Agreement that BHOA argued [with the Commission's

help in the form of a plant closure order] would excuse BMSC from performance of the terms of the Effluent Delivery Agreement "if . . . any laws, regulations, orders or other regulatory requirements prevent or materially limit the operation of the [WWTP] . . . ." I.R. 140, ¶27.

Wind P1 moved to intervene in the case on July 6, 2011, and was granted intervention by the Commission's hearing officer on January 6, 2012. I.R. 140, ¶28. The Commission's hearing officer held a hearing on May 8, 2012, followed by briefing by the parties, and issuance of a recommended opinion and order. I.R. 140, ¶29. Wind P1 then filed exceptions to the hearing officer's recommended opinion and order, and a motion to strike un-admitted public comments from the recommended opinion and order. I.R. 140, ¶30; I.R. 143, Ex. 17. The final Commission Decision No. 73885 followed. I.R. 141, Ex. 3.

ISSUES PRESENTED

1. Did the trial court err in concluding that A.R.S. §§ 40-321(A), 40-331(A), and 40-361(B) grant the Commission authority to order BMSC to close a compliant wastewater treatment plant to remediate alleged nuisance conditions on non-utility properties?

2. Did the trial court err in granting summary judgment to the Commission, denying Wind P1 a trial de novo on the question of the lawfulness and reasonableness of the Commission's plant closure order under A.R.S. § 40-

254, where evidence presented to the trial court demonstrated disputes of material facts in Wind P1's favor?

3. Did the trial court err in granting summary judgment to the Commission by concluding as a matter of law that the Commission's unprecedented plant closure order does not violate the contract impairment clauses in United States Constitution Article I, section 10, and Arizona Constitution Article 2, section 25, because the parties' expectation of future regulation completely negated the substantial nature of the contract impairment?

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews the judgment of the Superior Court rather than the decision of the Commission, and reviews the facts and reasonable inferences in the light most favorable to the party against whom the Superior Court granted summary judgment. *Phelps Dodge Corp. v. Ariz. Elec. Power Co-op., Inc.*, 207 Ariz. 95, 103, 83 P.3d 573, 581 (App. 2004) (internal citations omitted) ("*Phelps Dodge*"). Any evidence or reasonable inference contrary to the material facts needed for judgment will preclude summary judgment. *United Bank of Ariz. v. Allyn*, 167 Ariz. 191, 195, 805 P.2d 1012, 1016 (App. 1990), *review den'd* (citation omitted). This Court applies the same standard as that used by the trial court in ruling on the summary judgment motion in the first instance. *Id.*

II. ISSUE 1: COMMISSION LACKS AUTHORITY TO ORDER CLOSURE OF A COMPLIANT PLANT TO REMEDIATE ALLEGED NUISANCE CONDITIONS ON NON-UTILITY PROPERTIES

The Commission's powers are limited to those derived expressly from the Constitution or through express legislative delegation; the Commission has no implied powers. *Phelps Dodge,* 207 Ariz. at 111, 83 P.3d at 589 (internal citations omitted); *Trico Elec. Co-op. v. Ralston*, 67 Ariz. 358, 365, 196 P.2d 470, 474 (1948) ("The Corporation Commission has no implied powers and its powers are limited to those derived from a strict construction of the Constitution and implementing statutes."); *see also Tonto Creek Estates Homeowners Ass'n v. Ariz. Corp. Comm'n*, 177 Ariz. 49, 55, 864 P.2d 1081, 1087 (App. 1946) ("The Corporation Commission's powers are limited and do not exceed those to be derived from a strict construction of the Constitution and implementing statutes."); *US West Commc'ns, Inc. v. Ariz. Corp. Comm'n*, 197 Ariz. 16, 23, ¶28, 3 P.3d 936, 943 (App. 1999) ("The Commission's powers are limited to those declared in the constitution and implementing statutes."). In this case, no provision of the Constitution or the Commission's statutes expressly authorizes the Commission to order a utility to close a compliant wastewater treatment plant to remediate alleged nuisance conditions on non-utility properties.

A. Superior Court Correctly Concluded that the Commission Has No Constitutional Power to Order Plant Closure

The Superior Court properly concluded on page 3 of the Ruling that the Commission's plant closure order was not made under its constitutional authority for ratemaking in Article XV, section 3 of the Arizona Constitution. The Arizona Supreme Court long ago held that the only *legislative* power granted to the Commission in Article XV, section 3 of the Constitution is the ratemaking authority granted at the beginning of that section. *Corp. Comm'n v. Pacific Greyhound Lines*, 54 Ariz. 159, 169–77, 94 P.2d 443, 447–50 (1939) ("*Pacific Greyhound*") (construing the powers reserved to the legislature to regulate all corporations in Article XIV, section 14, as limiting the Commission's legislative authority to regulate the business of public utilities in Article XV, section 3 to ratemaking).

The Commission below challenged this longstanding precedent based upon this Court's listing of the constitutional provision along with other statutory provisions as authority for the decision at issue in *Ariz. Corp. Comm'n v. Palm Springs Utility Co.*, 24 Ariz.App. 124, 129–30, 536 P.2d 245, 250–51 (App. 1975) ("*Palm Springs*"). At issue in *Palm Springs* was whether the Commission could require a standard of potable water service through individual case orders as opposed to promulgating rules of general applicability. *Palm Springs*, 24 Ariz. at 129–30, 536 P.2d at 250–51. This Court in *Palm Springs*, however, noted the

parties in that case did not dispute the Commission's authority, and the authority issue was not explained by the Court, so it is not even clear if the issue was briefed. *Palm Springs*, 24 Ariz. at 126–27, 536 P.2d at 248–49.

Further, in two later cases considering the scope of the Commission's powers under Arizona Constitution Article XV, section 3, the courts have not even cited *Palm Springs* in the lines of relevant cases, but instead have continued to recognize the binding precedent in the *Pacific Greyhound* case. For example, in *Ariz. Corp. Comm'n v. Woods* , decided by the Supreme Court in 1992, the Attorney General refused to certify rules promulgated by the Commission to regulate public utilities' affiliate interests because, in part, under the controlling precedent in *Pacific Greyhound*, Article XV, section 3 grants the Commission no regulatory authority over public utilities outside of its ratemaking powers in that section. *Ariz. Corp. Comm'n v. Woods*, 171 Ariz. 286, 292-94, 830 P.2d 807, 813-15 (1992) ("*Woods*"). After reviewing the line of cases on this issue, and noting that *Pacific Greyhound* has been controlling precedent for over 50 years, the Arizona Supreme Court in *Woods* stated it would not overturn *Pacific Greyhound*, holding instead that the affiliate interest rules at issue in that case were reasonably necessary steps for ratemaking (because utilities can use affiliate entities to

manipulate rates). *Id.*[5] Even more recently, this Court in *Phelps Dodge* followed *Pacific Greyhound* in holding the Commission lacked power under Article XV, section 3 to promulgate a rule requiring utilities to create an administrator and coordinator to oversee fair access to transmission services because the provisions were not reasonably necessary steps for ratemaking. *Phelps Dodge*, 207 Ariz. at 111–12, 83 P.3d at 589–90.

As to whether the Decision in this case was ratemaking, this Court already determined it was not ratemaking for purposes of considering a direct appeal under A.R.S. § 40-254.01. I.R. 143; Ex. 19 (Court of Appeals Order dated August 26, 2013) ("We conclude that Decision No. 73885 did not arise from a process

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[5] The Supreme Court in *Woods* was somewhat critical of the *Pacific Greyhound* case reasoning, but the *Pacific Greyhound* precedent still makes perfect sense today. The Arizona Constitution expressly provides all legislative authority of the state to the legislature, except the powers reserved to the people through initiative and referendum in Article 4, Part 1, section 1. Other provisions in the Constitution indicate a clear intent that the Legislature was to exercise the power of the people. *See* Article III (powers of government divided into three separate departments); *see also* Article XV, section 6 (legislature may enlarge Commission powers and duties). The only specific grant of *legislative* authority to the Commission is in the introductory phrase of Article XV, section 3 (". . . commission shall have full power to, and shall, prescribe just and reasonable classifications to be used and just and reasonable rates and charges to be made and collected, by public service corporations within the state for service rendered therein . . ."). The remaining clauses in Article XV, section 3 that reference "rules, regulations, and orders" are commonly understood to refer to *administrative* functions that require implementing legislation. Construing these administrative words to provide the Commission instead with "concurrent" full legislative authority with the Legislature with no means to avoid an impasse with the Legislature on such broad topics could not have been logically intended.

involving rate making or rate design . . ."). There is no distinction to be made in this case between the application by the Court of Appeals of the statutory language in A.R.S. § 40-254.01 (appeal of an order "relating to rate making or rate design") and the "reasonably necessary step in ratemaking" standard described in the *Woods* and *Phelps Dodge* cases. It is clearly not a reasonably necessary step in ratemaking to order the closure of a valuable plant to address alleged nuisance conditions on nearby properties.

B. Superior Court Erred in Concluding the Commission Has Statutory Authority to Order Plant Closure under A.R.S. §§ 40-321(A), 40-331(A), and 40-361(B)

1. No Express Authority in Statute

The Superior Court erred in concluding that the Commission had statutory authority to order plant closure under A.R.S. §§ 40-321(A), 40-331(A), and 40-361(B). As stated in cases cited at the beginning Section II.A., *supra*, the Commission's statutory powers are limited to those derived through strict construction of express legislative delegations; the Commission has no implied powers. *See, e.g., Phelps Dodge,* 207 Ariz. at 111, 83 P.3d at 589. These three statutes do not expressly authorize the Commission to order plant closure to remediate alleged nuisance conditions at non-utility properties.

Section 40-321(A) provides as follows:

> When the commission finds that the equipment, appliances, *facilities or service* of any public service corporation, or the methods of

> manufacture, distribution, transmission, storage or supply employed by it, *are unjust, unreasonable, unsafe, improper, inadequate or insufficient, the commission shall determine what is just, reasonable, safe, proper, adequate or sufficient*, and shall enforce its determination by order or regulation.

(Emphasis added). This section does not expressly grant the Commission power to remediate alleged nuisance conditions at non-utility properties with plant closure orders. The section addresses "facilities" and "services." Application of the plain words of this section would have required that the Commission first find that the WWTP (the "facility") or BMSC's "service" are "unjust, unreasonable, unsafe, improper, inadequate or insufficient," and also find what facilities or service are "safe, proper, adequate or sufficient." In this case, the Commission found that the WWTP is operated in full compliance with all applicable law and industry standards, and is used and useful in service to customers, and the Commission identified no defect in BMSC's wastewater service. I.R. 140, ¶¶ 24, 33. Rather, the Commission found fault with the WWTP's *location*, concluding vaguely that "due to its location, the Boulders WWTP can no longer be operated in a manner consistent with the public interest . . ." I.R. 141, Ex. 3 (Decision 73885 at 49:16-19, 50:7-11). The statute does not address facility siting.

Even if authority to order plant closures to remediate off-site nuisances is implied in the vague words used by the Legislature in this section (contrary to the case law that prohibits implied powers), the Commission has no express authority

under A.R.S. § 40-321(A) to do anything unless it determines a facility standard or service standard is not being met. Section 40-321(A) grants the Commission no express authority to enforce a plant closure. *See also Peeples, Inc. v. Arizona State Land Dept.*, 204 Ariz. 66, 71, 59 P.3d 830, 835 (App. 2002) (administrative agency may not carry out enforcement actions that are not authorized by the express provisions of its enabling statutes) (citation omitted).

The Commission further relied on section 40-331(A), which provides:

> When the commission finds that additions or improvements to or changes in the existing plant or physical properties of a public service corporation ought reasonably to be made, or that a new structure or structures should be erected, *to promote the security or convenience of its employees or the public*, the commission shall make and serve an order directing that such changes be made or such structure be erected in the manner and within the time specified in the order. If the commission orders erection of a new structure, it may also fix the site thereof.

(Emphasis added). This section grants no authority to the Commission to remediate off-site nuisances. There is no "security" or "convenience" issue here, so this section does not apply. There was no evidence presented that the WWTP is an insecure facility. Further, convenient sewer service is already being provided to each home or business via underground pipes, and such service would be the same before and after any change in the off-site treatment plant location. In a utility context, "convenience" has been interpreted to mean "adequate service" at a "reasonable rate." *James P. Paul Water Co. v. Ariz. Corp. Comm'n*, 137 Ariz. 426,

429, 671 P.2d 404, 407 (1983). The only siting authority granted in this section is restricted to the construction of *new* facilities to promote security or convenience, a topic not applicable to this case.

Finally, section 40-361(B) does not grant express authority to the Commission to order closure of the WWTP. This section does not grant any authority to the Commission, but simply requires that "[e]very public service corporation shall furnish such . . . equipment and facilities as will promote the safety, health, comfort and convenience of its patrons, employees and the public, and as will be in all respects adequate, efficient and reasonable." A.R.S. § 40-361(B). The Commission can enforce this statute only in accordance with the Commission's express enforcement authorities in Title 40, Article 9 (providing for enforcement by court actions and fines). The absence of language precluding the Commission from ordering a plant closure to enforce 40-361(B) cannot be construed as an express grant of such authority.

2. The Legislature Did Not Intend to Grant the Commission Authority to Issue Plant Closure Orders to Remediate Alleged Nuisance Conditions on Off-Site Properties

Words used by the Legislature in A.R.S. §§ 40-321(A) and 40-331(A) (such as the words "improper" and "unjust"), if even applicable here given their vagueness, are at best capable of more than one construction and are thus ambiguous. The Legislature has not defined these words, especially in the context

of sewer treatment plants or nuisances. For example, it is reasonable to interpret the terms "unjust" or "improper" or "unreasonable" in the context of these statutes to require that the Commission apply objective standards of equipment performance or service rather than a subjective standard such as whether a particular customer is offended. To the extent the Court does not find these terms too vague to even apply, the ambiguity in these terms make it proper for the Court to resort to the rules of statutory interpretation. *See State v. Sweet*, 143 Ariz. 266, 269–70, 693 P.2d 921, 924–25 (1985) (ambiguity found when there is uncertainty as to the meaning of the terms of a statute or failure to include necessary words that causes confusion as to the scope of the statute); *see also State v. Marana Plantations, Inc.*, 75 Ariz. 111, 114–15, 252 P.2d 87, 89–90 (1953) (finding statute granting Board of Health power to "regulate sanitation and sanitary practices in the interests of public health" unconstitutionally delegated legislative power to administrative agency).

The primary goal in interpreting a statute is to discern and give effect to legislative intent. *People's Choice TV Corp., Inc. v. City of Tucson*, 202 Ariz. 401, 403, 46 P.3d 412, 414 (2002) (citation omitted). In doing so, the Court considers its context, language, subject matter, historical background, effects, consequences, spirit and purposes. *Id.* (citation omitted). The plain language of these two statutes in the context of the Commission's statutory powers in Title 40 expresses a general

intent that customers of utilities regulated by the Commission have access to adequate utility services, but the language does not express an intent that the Commission adjudicate and remediate nuisances on non-utility properties or re-zone existing plant sites.

Historical circumstances at the time the statutes were enacted indicate the Legislature had no specific concern regarding empowering the Commission to remediate nuisance conditions near sewer facilities. All of the statutes were in substantially the same form in the 1912 Laws of Arizona. Laws Ariz., ch. 13(b), 35, 36. The Commission had no jurisdiction over sewer utility companies until 68 years later, starting in 1980, when the definition of "public service corporations" in the Arizona Constitution was amended to add references to sewage service providers. Ariz. Const. Art. XV, section 2.

Against this backdrop of vague statutory authority and no prior precedent for the Commission's administrative action in this case, in 1986, the Legislature created the Arizona Department of Environmental Quality ("ADEQ"), specifically to regulate on a statewide basis, among other things, odor emissions from sewer treatment plants and the design, construction, and operation of such plants. *See generally* A.R.S. § 49-101 *et seq.* The Legislature's subsequent creation of a new state agency to regulate on a statewide basis the same subject matter over which the Commission, another state agency, claims jurisdiction here should be examined

together because the statutes are asserted to relate to the same subject matter. *See Desert Waters, Inc. v. Superior Court*, 91 Ariz. 163, 171, 370 P.2d 652, 657 (1962) ("Statutes that are in pari materia should be read together and harmonized if at all possible.") (Internal citation omitted).

The Legislature has declared its intent that ADEQ be the primary regulator of air pollution through a coordinated state-wide program, in relevant part, as follows:

> The legislature finds and declares that air pollution exists with varying degrees of severity within the state, such air pollution is potentially and in some cases actually dangerous to the health of the citizenry, often causes physical discomfort, injury to property and property values, discourages recreational and other uses of the state's resources and is esthetically unappealing. The legislature by this act intends to exercise the police power of this state *in a coordinated state-wide program* to control present and future sources of emission of air contaminants to the end that air polluting activities of every type shall be regulated in a manner that insures the health, safety and general welfare of all the citizens of the state; protects property values and protects plant and animal life. *The legislature further intends to place primary responsibility for air pollution control and abatement in the department of environmental quality and the hearing board created thereunder.* However, counties shall have the right to control local air pollution problems as specifically provided herein.

A.R.S. § 49-401(A) (emphasis added). The statutory provisions defining this coordinated statewide program delegate no role to the Commission. "Air pollution" is defined broadly in ADEQ's statutes to include "odors . . . or any other material in the outdoor atmosphere" that "by reason of their concentration and duration are or tend to . . . unreasonably interfere with the comfortable enjoyment

of life or property of a substantial part of the community . . ." A.R.S. § 49-421(1), (2). The Legislature specifically requires ADEQ to "[p]rovide for the prevention and abatement of all . . . air pollution including that related to . . . odor . . ." in accordance with the detailed program requirements and limitations as defined in Title 49. A.R.S. § 49-104(A)(10). While there is a general provision in A.R.S. § 49-467 that, as relevant here, preserves to the "state" the right to exercise its rights under "statutory law" to "suppress nuisances or to abate pollution," neither of the Commission's statutes, § 40-321(A) nor § 40-331(A), address the abatement of nuisances or air pollution, a power which the Legislature would have included if the Commission was intended to regulate public nuisances or air pollution. *Compare with* A.R.S. § 36-601 *et seq.* (empowering Health Department to regulate certain public nuisances) *and* A.R.S. § 13-2917 (power to address and abate public nuisance within state criminal code).

ADEQ is also specifically vested with all state authority to prescribe rules for the design standards for sewer collection and treatment systems. A.R.S. § 49-104(B)(9) (department shall "[s]upervise sanitary engineering facilities and projects in this state, authority for which is vested in the department . . ."). ADEQ is further vested with specific authority to regulate sewer treatment facilities and related public nuisances. A.R.S. §§ 49-104(B)(10) (shall adopt and enforce rules relating to design documents for sewer facilities), (11) (shall define and prescribe

reasonably necessary rules for sewage disposal in subdivisions), (14) (shall prescribe reasonably necessary rules to abate public nuisances relating to sewage treatment and disposal).

The Legislature expressed its intent that ADEQ's rules be observed statewide, recognizing that "local governing bodies" may enact stricter regulations if such authority is provided to the local bodies in a separate law, but imposing specific limitations on county regulation. A.R.S. §§ 49-106, 112. The Commission is not mentioned. ADEQ may delegate portions of its statewide authority, but not to the Commission. A.R.S. § 49-107(A) (ADEQ may delegate to local environmental agency, county health department, public health services district, or municipality).

The Legislature further delegated to ADEQ additional specific "catch-all" authority to prevent and abate environmental nuisances in soil, air, or water not otherwise covered in Title 49. *See* A.R.S. § 49-141 *et seq.* Then, in 2010, the Legislature added a restriction to ADEQ's statewide authority, requiring ADEQ to, unless specifically authorized by the Legislature, "ensure that state laws, rules, standards, permits, variances and orders are adopted and construed to be consistent with and no more stringent than the corresponding federal law that addresses the same subject matter." A.R.S. § 49-104(17).

The Legislature's subsequent delegation of the state's regulatory authority on the same topics to ADEQ, with specific limitations on such delegations as are contained in Title 49, is inconsistent with an interpretation of the Commission's general statutes (statutes that do not even mention the words "odor" or "nuisance") that would newly recognize that the Commission is empowered to thwart the Legislature's intent by regulating such facilities in an inconsistent manner and without abiding by the specific limitations placed on newer regulations in Title 49.

Further, in the Commission's statutes, A.R.S. § 40-421(A) specifically limits the Commission to enforcing laws "the enforcement of which is not specifically vested in some other officer or tribunal." A.R.S. § 40-421(A). The Legislature has specifically vested ADEQ,[6] the Attorney General,[7] the Superior Court,[8] and in limited cases, private citizens,[9] with enforcement authority found in Title 49, as described above, so under the restriction in 40-421(A), the Commission is expressly prohibited from enforcing the laws over which others have been given such authority.

The context, language, subject matter, historical background, effects, consequences, spirit and purposes of A.R.S. § 40-321(A) and -331(A) and subsequent legislative enactments on the same subjects negate any intent of the

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[6] *See* A.R.S. § 49-142, 49-461 *et seq.*
[7] *See* A.R.S. § 49-461 *et seq.*
[8] *See* A.R.S. § 49-142, 49-461 *et seq.*
[9] *See* A.R.S. § 49-407.

Legislature to vest the Commission with authority to regulate odor and noise conditions on non-utility properties (or to retroactively re-zone the WWTP site).

3. The *Palm Springs* Case Does Not Apply

The Commission argued to the Superior Court that in *Palm Springs*, this Court already recognized its authority under the three statutes to require a higher level of service than health and safety requirements, but that is not what the Commission did here. Issuance of a plant closure order without identification of non-compliance with any discernible facility or service standard is quite different than the order in *Palm Springs*, which required a utility to comply with a recognized federal potable water quality standard where evidence demonstrated non-compliance. In *Palm Springs*, which was decided before the Legislature created ADEQ, the issue was whether a utility could be required by a Commission order to apply a federally-recommended standard for the taste and hardness of drinking water where there was an "absence of a previously adopted rule or regulation of general application." 24 Ariz. at 125, 536 P.2d at 246.[10]

The Commission in *Palm Springs* was resolving a customer dispute about the quality of a product (water) being sold by a utility to customers that the customers were expected to use in their homes. 24 Ariz.App. 124, 126, 536 P.2d

[10] Here, the Commission already has a rule of general applicability, A.A.C. R14-2-607, that simply requires all sewer treatment providers to comply with the design, construction, and operation requirements of ADEQ (the successor of the Arizona Department of Health Services) and Maricopa County.

245, 247 (App. 1994). Evidence indicated that the water was causing property damage or was in some cases unusable inside the customers' homes. Palm Springs, 24 Ariz. at 126, 536 P.2d at 247. The Commission heard evidence from a State Health Department engineer regarding the quality of the utility's water as tested by the department, how the tested quality compared to the applicable federal recommended water quality standard, the palatability and aesthetics of the water as tested, the comparative costs of treating the water and replacing the water supply, and the engineer's recommendation of one of the alternatives analyzed. *Id.* The Commission in *Palm Springs* ordered that the utility seek the most economical means of supplying satisfactory water to meet the federal recommended standard. *Id.* In contrast, in this case, the evidence identified no standard that is not already being met, and the Commission's order does not require the utility's compliance with a standard.

III. ISSUE 2: THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WHERE DISPUTES OF MATERIAL FACT WERE DEMONSTRATED, DENYING PLAINTIFF A TRIAL DE NOVO

A. Trial Court Erroneously Applied "Substantial Evidence" Rate Case Standard Instead of Rule 56 "Trial de Novo" Non-Rate Case Standard Required By A.R.S. § 40-254

The Plaintiff, Wind P1, was not seeking a review of a ratemaking decision by the Commission; rather, the Commission's Decision was appealed to the Superior Court under A.R.S. § 40-254(A), authorizing trial de novo challenges to

Commission decisions as "unreasonable," and "unlawful." Subsections 40-254(A) and (C) both provide that the Superior Court action shall be tried and determined as other civil actions, except as otherwise stated. The Arizona Supreme Court has held multiple times that, in *non-rate* cases brought under the Commission's statutory powers (such as those involving certificates of convenience and necessity), the express language of A.R.S. § 40-254 provides for a trial de novo in Superior Court in which the trial court weighs evidence and draws an independent conclusion subject only to the constraint that the burden of proving the invalidity of the Commission's conclusion is on the party adverse to the Commission. *See Tucson Elec. Power Co. v. Ariz. Corp. Comm'n,* 132 Ariz. 240, 243, 645 P.2d 231, 234 (1982) ("*Tucson Elec.*"), *quoting Rate Decisions: Judicial Review of the Arizona Corporation Commission*, 19 Ariz. L. Rev. 488, 493 (1977) *and citing Ariz. Corp. Comm'n v. Fred Harvey Transp. Co.*, 95 Ariz. 185, 190, 388 P.2d 236, 239 (1964) (recognizing numerous Arizona cases unequivocally held the superior court must exercise independent judgment); *Corp. Comm'n of Ariz. v. People's Freight Line*, 41 Ariz. 158, 161, 16 P.2d 420, 421 (1932) (the proceeding is a new and independent action heard de novo upon proper evidence, and not merely upon review of the evidence taken before the commission; trial court not bound to defer); *Ariz. Corp. Comm'n v. Reliable Transp. Co.*, 86 Ariz. 363, 371, 346 P.2d 1091, 1096 (1959) ("the superior court may properly hold an order unreasonable

on the basis of 'clear and satisfactory evidence' presented to it, whereas it may be perfectly apparent that the Commission acted reasonably on the basis of the evidence which it had to consider"); *Corp. Comm'n v. Southern Pac. Co.*, 55 Ariz. 173, 175–76, 99 P.2d 702, 703 (1940) ("the proceeding is not an appeal from the decision of the commission" but a new, independent action requiring review of new evidence from that presented to the commission).

In *Tucson Elec.*, ("*Tucson Elec.*"), a rate case, the Arizona Supreme Court addressed in detail the standard of review applicable in the Superior Court for review of *rate* cases, which prior to the 1991 enactment of A.R.S. § 40-254.01 (providing for direct appeals of rate cases to this Court), were also determined under A.R.S. § 40-254. The present case is not a rate case, but review of the *Tucson Elec.* case is helpful to understanding the distinction made in prior case law between the two different trial de novo standards historically applicable under A.R.S. § 40-254 to rate cases and non-rate cases.

Tucson Elec. and the authority relied upon by the Arizona Supreme Court in that decision demonstrate the de novo review standard applicable to *non-rate* cases: the trial court weighs evidence and draws an independent conclusion subject only to the constraint that the burden of proving the invalidity of the Commission's conclusion is on the party adverse to the Commission. The trial de novo standard applicable to *rate* cases, on the other hand, is more restricted due to the

Commission's plenary constitutional power to determine rates (a legislative function). *Tucson Elec.*, 132 Ariz. at 243, 645 P.2d at 234 (citations omitted); *Simms v. Round Valley Light & Power Co.*, 80 Ariz. 145, 154, 294 P.2d 378, 384 (1956) (restriction on de novo review in rate cases not in conflict with prior precedent allowing independent judgment in questions of public convenience). In contrast to the independent conclusion the Superior Court may reach in a non-rate case review, the Superior Court in a rate case under A.R.S. § 40-254 was not permitted to re-weigh the evidence and substitute its judgment for that of the Commission – it had to uphold the Commission's decision if it was supported by "substantial evidence." *Id.* Since this is not a rate case, however, the Superior Court is not constitutionally constrained to the "substantial evidence" standard and instead applies the plain language in A.R.S. § 40-254. The plain language of A.R.S. § 40-254 requires that the Superior Court apply the summary judgment standard applicable to other civil actions in Arizona Rule of Civil Procedure 56(a), granting summary judgment only if it finds "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law."

But even in a rate case appeal brought under A.R.S. § 40-254 (prior to the enactment of A.R.S. § 40-254.01), with the recognized constitutional restriction on review described in *Tucson Elec.*, the trial de novo standard allowed "all parties to be heard and to present evidence before a decision is made as to whether the

findings and conclusion of the Corporation Commission are supported by substantial evidence." *Tucson Elec.*, 132 Ariz. at 244, 645 P.2d at 235. The Supreme Court agreed with the dissent's following statement in that case:

> * * * Admittedly, the nature of the judgment which may be rendered on review in superior court is far more restrictive in 'rate' cases than in 'certificate' cases. However, the whole concept of the de novo review provided for in A.R.S. § 40-254 is the right to introduce new evidence before any determination is made by the court. * * *

Id.

Here, the Superior Court in granting summary judgment to the Commission before trial based upon an erroneous "substantial evidence" standard, denied Wind P1 a trial de novo and the right to introduce new evidence before a decision was made. *See* I.R. 197 (Ruling, pp. 2, 4, 5).[11] The Superior Court's citation to *Grand Canyon Trust v. Ariz. Corp. Comm'n,* 210 Ariz. 30, 33–34, 107 P.2d 356, 360 (App. 2005) ("*Grand Canyon*") on pages 2 and 5 of the Ruling for the "substantial evidence" standard confirms the trial court applied the wrong review standard to the summary judgment motions in this case. The standard of review was not at issue in *Grand Canyon,* and the *Grand* Canyon case was not a rate case, but all of the cases cited in *Grand Canyon* regarding the review standard were rate cases. *Id.* at 34, 360, *citing Tucson Elec.*, 132 Ariz. at 243–44, 645 P.2d at 234–35 *and Ariz.*

[11] Plaintiff notes the Appellee in a case currently pending before this Court, *Sierra Club—Grand Canyon Chapter v. Ariz. Corp. Comm'n*, Case No. 1-CA-CV 14-0003 made an argument on this same issue in Appellee's Answering Brief docketed June 10, 2004, pp. 20–29.

Corp. Comm'n v. Citizens Utils. Water Co., 120 Ariz. 184, 187, 584 P.2d 1175, 1178 (App. 1978). In the context of *Grand Canyon*, a non-ratemaking case, the Court's characterization of the standard of review applied by the superior court in that case was actually contrary to established Arizona Supreme Court case law. The Superior Court erred here in deferring to the Commission's factual findings rather than applying the summary judgment standard in Ariz.R.Civ.P. 56(a).

B. Trial Court Erred in Denying Admission of Affidavit of Robert Owens Based on Erroneous Application of "Substantial Evidence" Standard

In response to the Commission's cross-motion for summary judgment, Plaintiff offered the Affidavit of Robert L. Owens, II, P.E. ("Owens"), a professional engineer with expertise in the area of wastewater odor investigation, design, and remediation. *See* I.R. 197 (Ruling, p. 5). Plaintiff offered the Owens affidavit per Arizona Rule of Civil Procedure 56(e) to explain the categories of facts that, in his expert opinion, are important to investigation and remediation of odors, and to further to assist the trier of fact in identifying and understanding how the specific facts of this case contribute to certain technical conclusions, such as causation. The Owens Affidavit was further offered per Arizona Rule of Civil Procedure 56(e) to demonstrate that the Commission's Decision was unreasonable under A.R.S. § 40-254 because the Commission lacked information that is material to the reasonableness of its decision to issue a plant closure order. The Superior

Court concluded that "[i]n essence, Owens opines that there is insufficient evidence in the record to support Decision 73885." I.R. 197, p. 5.[12] Plaintiff agrees that a person reading the Owens Affidavit could come to the conclusion that the Commission lacked evidence that Mr. Owens believes is needed to isolate the causes of odors, to determine their strengths and compare them to the industry standards he identifies, and to determine whether plant closure will effectively remediate odors, but the Owens Affidavit and its attached evidence should have been considered for the purposes for which it was offered – to demonstrate disputes of material fact requiring a trial.

The Superior Court concluded summarily that the Owens Affidavit was not admissible because "whether substantial evidence supports the [Commission's] order does not raise material issues of fact; it presents a question of law," citing the erroneous standard in *Grand Canyon* and an inapplicable State Land Department case standard. I.R. 197, p. 5, citing *Grand Canyon,* 210 Ariz. at 34, 107 P.3d at 360 (citing *Havasu Heights Ranch & Dev. Corp. v. Desert Valley Wood Prods., Inc.*, 167 Ariz. 383, 387 (App. 1990)). As explained in the prior section of this

[12] The Superior Court on page 7 in the Ruling appears to imply that the Plaintiff did not put on evidence to rebut the BHOA's case for plant closure. The Plaintiff did introduce evidence regarding the Plaintiff's interests, but there was no evidence to rebut regarding the condition of the plant – all parties to the Commission's evidentiary hearing agreed the plant meets all industry standards, and no contrary evidence was introduced.

brief, the Superior Court erred in deferring to the Commission's factual findings under the "substantial evidence" standard applicable to rate case appeals.

The Superior Court seems to be saying in its denial of admission of the Owens Affidavit that a party aggrieved by an order of the Commission cannot challenge the reasonableness of the Commission's adverse factual findings in a trial de novo even if the party demonstrates disputes of material fact in the Commission's record. This conclusion directly contradicts the language in A.R.S. § 40-254 and well-established Arizona case law holding the trial court weighs the evidence, including new evidence, and draws an independent conclusion. "Summary judgment is not designed to resolve factual issues, but to ascertain whether such issues exist." *Chanay v. Chittenden*, 115 Ariz. 32, 39, 563 P.2d 287, 294 (1977) (citation omitted). The Superior Court applied the wrong standard when determining whether the Owens Affidavit could be considered, which was an abuse of discretion. *Webb v. Omni Block, Inc.*, 216 Ariz. 349, 352, 166 P.3d 140, 143 (App. 2007) (admissibility of expert testimony is in the sound discretion of trial court except when court commits an error of law in reaching a discretionary conclusion) (citations omitted).

But even if the Owens Affidavit had not been offered in response to the Commission's cross-motion for summary judgment, the evidence submitted by the parties with the motions, including the materials from the administrative record

attached to the Owens Affidavit, demonstrates genuine disputes of material fact for trial.

C. The Evidence Cited by the Commission Demonstrates Disputed Facts Regarding the Alleged Odors and Noises, Their Sources, and the Effectiveness and Reasonableness of Closure as a Solution to the Unproven Remaining Problems

In moving for summary judgment, the Commission cited purportedly undisputed facts regarding the alleged odor and noise problems that the Commission's closure order would supposedly solve. However, reviewing the actual ***evidence*** reveals that ***not a single one*** of the critical facts regarding odors or noises necessary to support the Commission's closure order is, in fact, undisputed.[13] The record reveals that at least three categories of disputed and critical factual issues exist that are fundamental to supporting or refuting the factual basis of the Commission's closure order:

(1) A threshold category of disputed and critical factual issues is whether an unreasonable level of odors or noises exists in the community surrounding the WWTP, even though it is undisputed that previously ordered improvements to the plant effectively reduced odors and noise. The record contains evidence of customer complaints, which reflects that the

[13] As noted in footnote 12, Wind P1, having intervened at a late stage, did not present independent evidence to rebut the evidence before the Commission because that evidence itself failed to prove any of the three critical facts regarding the WWTP as an alleged source of unreasonable odors or noises, as discussed below.

WWTP suffered from an unfortunate reputation and community skepticism that predate the plant's improvements; however, the record is notably lacking in objective data from the post-improvement period of time to demonstrate that an ongoing problem persists with respect to the WWTP.

(2) Even assuming unreasonable odors persist (despite the absence of objective data to show that they do), a second category of critical and disputed factual issues is whether the continued operation of the WWTP is the source of such odors, and whether closing the WWTP would sufficiently mitigate them. The record contains the testimony of the Commission's own engineering expert establishing the existence of ***multiple*** sources of odors and failing to demonstrate that the Commission's closure order would solve any (presently unproven) odor problems that may exist.

(3) Even assuming that unreasonable odors persist, and further assuming they are caused by the continued operation of the WWTP (despite the absence of objective data on either count), a third category of critical and disputed factual issues is whether the WWTP's operation is unreasonable in light of its undisputed compliance with all applicable legal and industry standards. The record contains no evidence whatsoever that those standards are inadequate to prevent a nuisance based on unreasonable odors or noises. In the absence of such evidence, the record is consistent with the likely

possibility that the WWTP's and BMSC's history have provoked a "Not-in-My-Backyard" unpopularity based more on the longstanding community animosity toward, and poor reputation of, the WWTP than measurable evidence.

The Commission's statement of undisputed facts in support of its motion for summary judgment ignored the foregoing deficiencies and conflicts in the evidence, and instead listed superficial and inaccurate descriptions of the evidence that glossed over these material issues of fact. In granting summary judgment in the Commission's favor, the Superior Court failed to recognize that the evidence presented by the Commission proved almost nothing. The evidence in the record instead reflects the Commission's profound failure to investigate these intensively factual issues, objectively, scientifically, or otherwise.

The record further reflects that – in light of the fact that the WWTP's owner had agreed to a settlement agreement rather than continuing to fight the BHOA's largely hearsay complaints – the Commission simply elected to take a shortcut rather than thoroughly investigate the objective facts. However, summary judgment could not properly be based (as it implicitly was) on the mere ***inferences*** that the Commission elected to make (and incorrectly labeled as "undisputed facts") from its paltry record assembled in the absence of a full-blown adversary proceeding. The Superior Court was required to determine whether the evidence in

the record would preclude a jury at trial from reasonably drawing different inferences that could lead to findings different from those reached by the Commission and implicitly affirmed by the Superior Court. A review of the evidence underlying the purportedly undisputed facts cited by the Commission demonstrates that its cited evidence does not meet that standard, or even come close to it. The Superior Court's judgment should therefore be reversed.[14]

Under Rule 56, "[s]ummary judgment is not designed to resolve factual issues, but to ascertain whether such issues exist." *Chanay,* 115 Ariz. at 39, 563 P.2d at 294; *see* Ariz.R.Civ.P. Rule 56(a). As the moving party, the burden of demonstrating the absence of any disputed issues fell on the Commission. *See United Bank of Ariz. v. Allyn,* 167 Ariz. 191, 195, 805 P.2d 1012, 1016 (App. 1990) ("The burden of persuading the trial court that summary judgment was warranted fell to . . . the party seeking judgment."). Moreover, as the moving party, the Commission was required to meet this burden in the first instance with its own cited evidence, even without Plaintiff Wind P1 independently presenting controverting evidence. *See Allyn,* 167 Ariz. at 196, 805 P.2d at 1017 (holding that when a motion for summary judgment "fails to show entitlement to judgment, the adverse party need not respond to the motion with controverting evidence").

[14] Indeed, to the extent that the evidence cited by the Commission instead demonstrates that the Commission failed to meet its burden to provide a factual basis to support the drastic relief ordered that impairs Wind P1's constitutional and legal rights, that evidence justified partial summary judgment in Wind P1's favor.

Any evidence ***or reasonable inference contrary to the material facts needed for judgment*** will preclude summary judgment. *Id.* (emphasis added). Therefore, where the record cited by the moving party itself is sufficiently ambiguous or conflicted that a reasonable jury could make different inferences than those made by the judge, the court's order of summary judgment must be reversed. *See id.*; *see also Cruz v. City of Anaheim*, 765 F.3d 1076, 1079 (9th Cir. 2014) (reversing summary judgment for defendant despite the uncontroverted nature of defendants' evidence because a reasonable "jury could reach the opposite conclusion" from that of the trial judge). The record cited by the Commission demonstrates that disputed issues of fact exist with respect to practically every fact that the Commission needed to rely on to support its closure order.

The record, therefore, requires that Plaintiff be given its day in court in a trial. This Court reviews the judgment of the Superior Court rather than the decision of the Commission, and reviews the facts and reasonable inferences in the light most favorable to the party against whom the Superior Court granted summary judgment. *Phelps Dodge*, 207 Ariz. 95, 103, 83 P.3d 573, 581 (App. 2004) (internal citations omitted). This Court applies the same standard as that used by the trial court in ruling on the summary judgment motion in the first instance, and therefore examines the record below de novo. *Id.* Reviewing the facts and reasonable inferences in the light most favorable to the Plaintiff, the

materials accompanying the Commission's summary judgment motion themselves demonstrate that a reasonable jury could reach different inferences regarding essentially ***all*** the critical factual issues concerning the levels of odor and noise allegedly emitted by the WWTP. At least three categories of disputed and critical factual issues were demonstrated by the Commission's own materials, and thus preclude summary judgment in the Commission's favor, as discussed below.

1. Disputed Issue of Fact: Whether There Are Ongoing and Unreasonable Levels of Odors and Noise, Despite BMSC's Improvements to the WWTP

The Commission offered no evidence of any measured values of odors or noises that might indicate objectively whether the odor and noise levels (which already fall within all applicable legal and industry standards) were reasonable or unreasonable at the locations where the Commission intended to remediate odors and noises by issuing a plant closure order. A reasonable jury or judge could find that a plant closure order was unreasonable and premature under the circumstances since no evidence was presented regarding measured odor or noise levels emitted ***outside the boundaries of the plant property***. Compounding the lack of objective evidence, the evidence regarding *qualitative* characterizations of the odors and their frequency was inconsistent. BMSC witness Greg Sorenson testified that, between December 2006 and December 2008, in addition to several projects relating to the collection system, BMSC "undertook several projects in an effort to

further reduce fugitive odor emissions from the treatment plant itself. We purchased, reconditioned and installed an odor scrubber . . . This process has been a very successful and cost efficient solution." I.R. 152, Ex. 4, p. 6. Sorenson testified further that BMSC undertook a noise study and implemented several projects "and all resulted in positive results." *Id.* He described remaining odors associated with the collection system and WWTP as "minor odor events." *Id.*

BMSC "installed four Odor Loggers at the plant in May 2008 to detect, measure and record hydrogen sulfide (H2S) levels." *Id.*, p. 7. Sorenson testified that "[s]ince installation of the devices, there have been only two notable odor events[15] recorded, both of which were concurrent with maintenance work on the plant's aeration system. Each of these lasted for only a short period of time." *Id.* Sorenson did not state the numeric values of the measurements or if any measurements of odor levels during these two events were made anywhere other than immediately adjacent to the Plant on BMSC's property.

Sorenson's description of BMSC's odor remediation efforts as "very successful," achieving "positive results," and measuring only isolated "minor odor events" at the Plant property after BMSC's changes, with only two "notable" odor events of short duration, viewed in the light most favorable to Plaintiff Wind P1,

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[15] The trial court on page 5 of the Ruling incorrectly describes this testimony as "several occasions." Mr. Sorenson describes the same two events in his hearing testimony, attached to Owens Affidavit (I.R. 174) as Exhibit E, pp. 141–44.

are inconsistent with the customer complaints describing odors as "noticeable," "objectionable," and "irritating." The BHOA/BMSC stipulated facts referred to by the Court on page 4 of the Ruling provided as follows:

> 5. Complaints have been received that odors from the Treatment Plant are noticeable by and objectionable to Boulders residents. Such residents have also complained that odors from the Treatment Plant can be irritating and sometimes interfere with residents' opportunity to leave their windows open to enjoy fresh air in the immediate vicinity of the facility. Residents of the Boulders have complained to the Boulders' community manager about odors from the Treatment Plant.
>
> 6. Complaints from residents regarding odors from the Treatment Plant appear more frequent from October through April.
>
> 7. Since Decision No. 71865 was issued, the Company has received and logged 23 odor complaints from customers (including a lawsuit filed in Maricopa County Superior Court by a resident living adjacent to the Treatment Plant).
>
> 8. A portion of the north Boulders golf course is adjacent to the Treatment Plant. Golfers playing the north Boulders golf course have also complained at times of noticeable odors as they pass by the Treatment Plant.
>
> 9. At times, noises from the operation of the Treatment Plant are noticeable from homes within approximately 400 feet of the Treatment Plant.
>
> 10. There is periodic traffic (service vehicles, pumper trucks, sub-contractor 18 vehicle parking, dumpsters, etc.) in the Boulders community associated with the Treatment Plant's operations.

I.R. 152, Att. 7, ¶¶5–10. During the Commission's hearing, Greg Sorenson's testimony and the Company's customer complaint log clarified that ***not all of the 23 odor complaints referred to in stipulated fact number 7 above were***

attributable to the WWTP, with a number relating to the collection system or conditions in homes or other causes. I.R. 174, Att. C, D.

Sorenson's testimony regarding the success of odor remediation efforts and only two "notable" odor events is seemingly inconsistent with the stipulated facts and public comments described in the Commission's written Decision that were not admitted into evidence at the hearing. *See, e.g.*, I.R. 140, Ex. 3 [Decision at 19:1-5, 20:13-15, 20:21-22 (relying on the content of public comments for "levels and frequencies" of odors; "almost unanimous support by customers for closing the plant", and stating that public comment provides "useful insight"); *see also* 20:13-15 (". . . the public comments . . . made clear that customers . . . have endured and continue to endure offensive odors . . . ."); 45:3-10 (Commission relies on public comments for its decision); *see also* Decision at 2:8-10, 2:23-27, 4:6-7, 4 (n.2), 4:19-5:1, 5(n.3), 19:1-20:15 (including footnotes); 27:2-4 (BHOA argument based on public comment inconsistent with witness testimony); 45:4-6, 45:8, 47:4-5, 49:12-13).[16] It should also be noted that the Superior Court and the Commission's Decision referred to a public comment submitted in the 2005 rate case by the

[16] Wind P1 has repeatedly objected to the Commission's apparent reliance on certain specific public comments cited in its Decision as Wind P1 was given no opportunity to cross-examine those providing the comments and the Commission's rules require that it rely only on sworn testimony. Wind P1 believes the trial court erred in concluding that the Commission "could fairly consider the comments short of admitting them into evidence" in an adjudicative proceeding because an administrative agency cannot violate its own rules.

Resort's Director of Golf Operations, Tom McCahan, regarding "intermittent smells and odors", but that public comment was outdated as it preceded BMSC's more recent odor remediation improvements to the Plant made prior to the latest hearings. I.R. 197, p. 4 (referring to Decision No. 73885 at 45, n. 18). Further, Plaintiff does not deny there are intermittent odors, just as Plaintiff would not deny that diesel trucks emit intermittent odors, and, for that matter, that garbage cans or grease traps or restrooms emit intermittent odors, all of which are necessary and useful features of daily living. The point here is that a jury could infer and find that it is unreasonable to enforce the penalty of closure of a valuable plant that already meets all reasonable, objective standards, especially given the sketchy nature of the Commission's evidence.

The Superior Court summarily concluded in granting summary judgment that evidence submitted with the motions established sufficient evidence that "offensive" odors emanated from the WWTP. I.R. 197, p. 4. "Offensive" is a highly subjective term that is not defined anywhere in the Commission's statutes or the Court's Ruling. Further, the "offense" a particular witness feels is an arbitrary standard for the Commission to adopt to justify a costly plant closure decision. *See also Bakery Salvage Corp. v. City of Buffalo*, 573 N.Y.S.2d 788, 790, 175 A.D.2d 608, 610 (N.Y. App. Div. 1991) (municipal ordinance containing no objective standards by which one can determine the quantum of emissions of odors declared

unconstitutional for vagueness). Under that sort of measurement, the evidence in this case also compels the closure of the sewer pipes, lift stations, and manholes serving the community. Presumably all power plants, electrical substations, and transmission lines that offend neighbors are subject to closure, too. Whether the Commission applied a reasonable standard to odor emissions with appropriate supporting evidence is material to whether the plant closure decision was unreasonable or unlawful under A.R.S. § 40-254(A).

Considering all of the qualitative descriptions of the alleged nuisance conditions above, a jury could infer and find that the Commission's plant closure order was unreasonable because the evidence does not establish nuisance conditions, or that the descriptions of odors and noises were too subjective to be credible; and that the descriptions and recollections were colored by the history of problems predating the WWTP's improvements, animosity arising from its checkered past, and a (perhaps understandable) unwillingness to give the WWTP and BMSC any benefit of the doubt regarding any bad odors, the source of which is not immediately identifiable. In a trial de novo, there would be no one-sided public comment process, witnesses would be sworn and subject to cross-examination, and the jury would need to consider witness credibility in making these determinations. Furthermore, objective evidence beyond the Commission's "complaints-were-made" stipulation presumably would be presented at trial to

substantiate or rebut perceptions of continuing problems from the WWTP, and Plaintiff would have the opportunity to present its own scientific evidence. These are matters for a trial.

2. Disputed Issue of Fact: Whether the WWTP's Operation is the Source of the Alleged Unreasonable Odors and Noise, or Whether Other or Alternative Sources Exist

The evidence is undisputed that there are multiple odor sources in the area of concern, and that the plant closure will not resolve all odors that led to customer complaints. This evidence, presented in the record without sufficient objective analysis to ascertain what part of the problem, if any, is caused by the continued operation of the WWTP, thus creates material issues of fact that a jury would have to sort out. Of the 23 complaints logged by BMSC over the 2010-2012 timeframe, a number were unrelated to the WWTP. *See* I.R. 174, Ex. D, pp. 157–59, and Ex. C. Les Peterson, BHOA's sole lay witness, agreed that there are multiple causes of odors. I.R. 143, Ex. 14 at 355: 11-18. ("So we are now confident this processing or treatment plant is the primary remaining source of odors, although there are other things . . . and there are manholes that are now under golf course greens and things like this, which sometimes there will be odors that come up through there..."). The Commission's staff engineer, Dorothy Hains, testified that odors originated from lift stations and manholes in the collection system too, and those odors would continue. *See* I.R. 143, Ex. 15, pp. 617:2-619:4, 638:5-641:24,

642:23-643:13, 655:19-659:1. The effect of closing the WWTP, therefore, remains objectively unknown.

Mr. Owens, an expert in odor remediation, testified that, in order to determine the cause of odors, it is necessary to examine the collection system because collection systems (that collect raw sewage) are often the source of surfacing odors. I.R. 174, ¶6. He would need to examine design and operation data for the system, and since this is an existing system, he would measure the strength of gases at points throughout the neighborhood to pinpoint release locations. *Id.* This sort of objective information was not considered by the Commission, and a reasonable jury or judge could determine that the Commission had insufficient information to determine the effectiveness of a plant closure order to remediate neighborhood odors and noises, especially as to those properties located hundreds of feet from the Plant. The inadequacy of the record cited by the Commission leaves open the risk that closing the WWTP would not solve any odor problems, even assuming they persist. Again, a trial is warranted.

3. Disputed Issue of Fact: What Objective Standard for Measuring the Reasonableness of Odors and Noise Should Apply If Existing Legal and Industry Standards Are Met

The evidence submitted with the summary judgment motions demonstrated that BHOA and BMSC, the only parties urging the WWTP closure order, stipulated in relevant part as follows:

> 11. The Treatment Plant is operated in full compliance with all applicable law and industry standards. In addition, BMSC has taken steps to minimize odors and noises from operation of the facility, including, among other improvements, the installation of an odor-scrubber.
>
> * * *
>
> 13. The issue is one of location rather than anything BMSC has done wrong or failed to do.

I.R. 152. Mr. Owens testified in his Affidavit that he found no measurements in the materials he reviewed to compare to "accepted industry standards such as those adopted by the Water Environment Federation and American Society of Engineers..." I.R. 174, ¶6.

Plaintiff agrees with the stipulated facts quoted above: There was no evidence presented to the Commission or the Superior Court indicating that the WWTP violates any applicable legal or accepted industry standard regarding odor or noise emissions. This is a material fact directly relevant to whether the Commission's plant closure order was "unreasonable" or "unlawful" under A.R.S. § 40-254(A), including whether the Commission met the statutory requirement that the Commission determine "what is just, reasonable, safe, proper, adequate or sufficient" under A.R.S. § 40-321(A). This undisputed fact would allow a reasonable jury to infer that closure is an unreasonable response. This undisputed fact also raises questions regarding whether complaints about the WWTP are potentially rooted in its poor reputation resulting from the Plant's history of odors

before BMSC's remedial corrections, the desire to rid the community of a useful sewage treatment plant out of a "Not-in-My-Backyard" sentiment, or even to a potentially short-sighted belief that property values would improve without such an operation (or all of the above). A reasonable jury could find that the plant closure order was unreasonable due to the plant's compliance with all industry standards and legal requirements.

The bottom line is that the Commission's purported evidence – far from actually proving any of its contentions regarding the odors – actually demonstrates that disputed and critical issues exist regarding all the material factual questions:

- whether odors or noises really exist in any unreasonable amount;
- whether, if so, they are actually coming from continued operation of the WWTP or potentially from other sources, and whether closing the plant would stop any such odors; and
- whether some objective standard exists that should reasonably be applied to the WWTP beyond the applicable legal and industry standards to which it undisputedly adheres.

Based on at least these three material issues of fact, it is plain that a party would not be entitled to summary judgment granting an order to permanently close a wastewater treatment plant if this case had been originally filed in Superior Court as a nuisance case. Though this case originated before the Commission, its motion

for summary judgment improperly relies on the Commission's own inferences (which are not controlling, given Plaintiff's right to a trial de novo), and a reasonable jury could make different inferences based on the evidence in the record. Therefore, the Superior Court's summary judgment order in favor of the Commission should be reversed.

IV. ISSUE 3: THE TRIAL COURT ERRED IN CONCLUDING PLANT CLOSURE ORDER DID NOT VIOLATE CONSTITUTIONS' CONTRACT IMPAIRMENT CLAUSES

In Count 4 of its Complaint in Superior Court, Wind P1 asserted the Commission's plant closure order is a state action that unconstitutionally deprives Wind P1 of its contractual right to continued effluent delivery through March 2021. I.R. 1, pp. 11-12. To determine whether the Commission exercised its powers properly under the constitutional contract impairment provisions in Article I of the United States Constitution and article II, section 25 of the Arizona Constitution, a court will apply a three-part test. *Phelps Dodge,* 207 Ariz. at 119, 83 P.3d at 597, *citing Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 410, 103 S. Ct. 697, 74 L.Ed.2d 569 (1983); *McClead v. Pima County*, 174 Ariz. 348, 359, 849 P.2d 1378, 1389 (App. 1992). First, the Court will determine whether the order substantially impairs a contractual relationship. *Phelps Dodge,* 207 Ariz. at 119, 83 P.2d at 597. The severity of the impairment will increase the level of scrutiny of the impairment. *Energy Reserves*, 459 U.S. at

411, *citing Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978). Second, if there is substantial impairment, then the Commission would need to identify a significant and legitimate purpose to justify the order. *Phelps Dodge*, 207 Ariz. at 119, 83 P.2d at 597. Finally, if such a purpose exists, then the Commission would need to demonstrate that the adjustment of the parties' contractual obligations is reasonable and appropriate to the public purpose justifying the order. *Id.*

In response to the summary judgment motions, the Superior Court reached only the first part of the test, ruling that the Commission's plant closure order did not substantially impair a contractual relationship. First, the Superior Court found that language in the parties' Effluent Agreement providing generally that certain obligations of BMSC terminated "if physical conditions at the [Plant] or any laws, regulations, orders or other regulatory requirements prevent or materially limit the operation of the [Plant]" indicated the parties "contemplated that the Plant could be closed . . . " I.R. 197, p. 6. Second, the Superior Court cited *Energy Reserves*,459 U.S. at 413–16, for the proposition that parties operating in a heavily regulated industry are deemed to expect such regulation. *Id.*

The Superior Court's ruling is wrong for two reasons. First, to the extent that the Superior Court's holding depended on evaluation of the factual evidence of the Plaintiff's reasonable expectations in forming the contract, the Superior Court

applied the wrong legal standard to the summary judgment motion in deciding the matter. *See* Section III.A, *supra*. Second, the Superior Court misapplied the *Energy Reserves* precedent. The Superior Court applied the parties' operation in a "heavily regulated industry" as legally limiting the parties' reasonable expectations of full contract performance. The Superior Court thereby freed itself of its obligation to review the substantial nature of the contract impairment with greater scrutiny, based merely on the fact that the utility industry is heavily regulated. *Energy Reserves* does not stand for the rule that a contract in a heavily regulated industry limits the parties' reasonable expectations of full performance so that the reviewing court may apply a lower level of judicial scrutiny. In addition, despite the regulation of the utility industry and foreseeable necessary measures to maintain compliance with legal and industry standards, Plaintiff could not have anticipated that its fully-compliant and valuable plant would become so politically unpopular as to be singled out by the Commission and ordered closed under vague statutory law regarding the delivery of "adequate" utility service.

Whether a substantial impairment exists depends on three elements: (1) whether there is a contractual relationship, (2) whether the change in law impairs that contractual relationship, and (3) whether the impairment is substantial. *General Motors Corp. v. Romein*, 503 U.S. 181, 186, 117 L.Ed.2d 328 (1992). The severity of the impairment increases the level of scrutiny to which the

legislation will be subjected. *Energy Reserves,* 459 U.S. at 411, *citing Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 245, 57 L.Ed.2d 727 (1978). Plaintiff demonstrated undisputed facts establishing the contract and the severe and permanent nature of the impairment (loss of effluent deliveries) in its summary judgment motion. I.R. 140, ¶¶4-8, 26-27 (and exhibits referenced therein). The Superior Court's reliance on precedent in *Energy Reserves* regarding the substantial nature of the impairment, the third item in the substantial impairment test, is misplaced. This case is significantly different from the *Energy Reserves* case because the new regulation at issue here, which was in essence an unprecedented retroactive zoning decision, severely and permanently impairs only one party's contractual right to delivery of effluent from the WWTP, even though the WWTP already complies with the relevant state industry regulation. *See, e.g., Pure Wafer, Inc. v. City of Prescott,* 14 F.Supp.3d 1279, 1299 (D. Ariz. 2014) (rejecting city's argument that new ordinance cloaked as environmental regulation negated party's substantial interest in contract).

In *Energy Reserves,* the Supreme Court held that a change in the government's natural gas price fixing methodology did not substantially impair a contract term that escalated prices based on future changes in government price fixing, where the parties had agreed the contract was subject to relevant present and future state and federal law. 459 U.S. at 416. The new law at issue in *Energy*

Reserves involved a subject – government price fixing – that the parties clearly expected to change in the future. In fact, the contract price *depended* on future price fixing changes. The new law at issue in *Energy Reserves* was a statewide law applicable to all natural gas contracts executed before April 20, 1977. 459 U.S. at 407.

In contrast, in this case, the Commission's Decision is a party-specific, location-specific new regulation that severely impairs ***only*** the Plaintiff's contract, in a manner new and different from regulations applicable to all other wastewater treatment providers. The Commission has never ordered an existing, compliant plant to be closed because residents no longer wish to live near it. It is the nature of the Commission's action, not merely the closure order itself, which is unprecedented. No other wastewater providers are affected by the new regulation. This is not an anticipated "industry regulation" like the price control legislation addressed in *Energy Reserves*. *See, e.g., West End Tenants Ass'n v. George Washington University*, 640 A.2d 718, 733 (1994) (the holdings in *Energy Reserves* and *Allied Structural Steel* require that earlier regulation must share more with the challenged regulation than simply the broad industry in which it operates, or even broad phase of that industry's activity). The new regulation here was tailored as a plant closure order to assist BMSC in resolving a contractual obligation that BHOA asserted stood in the way of a voluntary plant closure. This

is precisely the type of case the contracts clauses were meant to address – those in which the state adopts as its policy "the repudiation of debts or the destruction of contracts or the denial of the means to enforce them." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 439, 54 S.Ct. 231, 78 L.Ed. 413 (1934).

Disputes of material fact exist in Plaintiff's favor on the question of substantial impairment because (1) there is no evidence the Commission had ever regulated odor emissions from wastewater treatment plants prior to the date of contract formation (negating the expectation of such regulation), (2) the Commission's statutory authority and rules provided Plaintiff with no advance warning that the Commission might someday enter the area of odor/noise regulation of plants and order the closure of a single plant that meets all relevant laws and industry standards, and (3) the Commission in this case made a case-specific order applicable to one wastewater treatment plant in direct response to a customer's request that the Commission provide BMSC with specific contractual relief. I.R. 143, Ex. 23, p. 1 (". . . BHOA asks that the Commission order BMSC to close the Treatment Plant, thereby relieving BMSC of its contractual obligation to provide effluent to the Resort . . ."). Wind P1 is entitled to a trial regarding the factors to be considered by the court in determining whether the plant closure order was a "substantial impairment."

REQUEST FOR ATTORNEYS' FEES AND COSTS

Plaintiff-Appellant Wind P1 requests that the Court, pursuant to A.R.S. §§ 12-341, 12-342, 12-348(A) and other applicable law, award Wind P1 its costs and reasonable attorneys' fees incurred in connection with this appeal and all related actions.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant, Wind P1, respectfully requests that this Court:

- Reverse the Superior Court's decision granting summary judgment to the Commission, and remand this case with instructions to enter judgment in Wind P1's favor as a matter of law because the Commission lacked authority to issue the plant closure order; or, in the alternative:
- Reverse the Superior Court's decision granting summary judgment to the Commission because disputes of material fact exist that require a trial de novo per A.R.S. § 40-254; and
- Reverse the Superior Court's ruling that the Commission's plant closure order was not a "substantial impairment" of the Effluent Delivery Agreement under the Contract Clauses of the United States

and Arizona Constitutions because disputes of material fact exist that require a trial de novo per A.R.S. § 40-254.

DATED this 1st day of December, 2014.

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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

WIND P1 MORTGAGE BORROWER, L.L.C., a Delaware limited liability company, Plaintiff/Appellant, v. ARIZONA CORPORATION COMMISSION; an agency of the State of Arizona; BLACK MOUNTAIN SEWER CORPORATION, an Arizona corporation; TOWN OF CAREFREE, an Arizona municipal corporation Defendants/Appellees.	**Case No. CA-CV 14-0643** Maricopa County Superior Court No. CV2013-007804
THE BOULDERS HOMEOWNERS ASSOCIATION, an Arizona non-profit corporation Intervenor/Appellee.	

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INTRODUCTION

The Arizona Corporation Commission ("Commission") is an agency of the State of Arizona that is constitutionally empowered to regulate public utilities.[1] The Commission began its regulation of sewer utilities after the amendment to article 15, sec. 2 in 1974 to include sewer companies in the definition of public service corporations.[2] This case concerns a Commission order requiring the closure of a wastewater treatment plant ("WWTP") that is located in the midst of a residential neighborhood. The WWTP emits offensive odors and has been the subject of customer complaints for a period of years. The WWTP in question is owned by Black Mountain Sewer Corporation ("BMSC"), an Arizona corporation engaged in the provision of sewer utility service to approximately 2,000 residential and commercial customers located in and around Carefree, Arizona.[3]

Appellant Wind P1 Mortgage Borrower, LLC ("Resort" or "Wind P1") owns and operates the Boulders Resort, a resort hotel located in Carefree, Arizona.[4] Wind P1 currently purchases effluent from the WWTP in order to irrigate its golf

[1] *See* Ariz. Const. art. XV, § 3.
[2] The Resort's opening brief states that the Commission's jurisdiction over sewer companies began in 1980. This is incorrect. Article 15, § 2 was amended effective December 5, 1974. In 1980, article 15, §§ 2 and 10 were amended to remove motor carriers and airlines from the definition of public service corporation.
[3] Index of Record, herein after "I.R.," 109, Certified Record Docket No. SW-02361A-08-0609, A-182 at 2:5-7 (Decision 71865). Certified Record, herein after "C.R.," is contained within the Index of Records sent from the Maricopa County Superior Court.
[4] I.R. 125, C.R. C-51 at 2:6-7.

courses.[5] The WWTP's effluent makes up approximately fifteen percent of the Resort's irrigation supply.[6] Closure of the plant will mean that there will no longer be effluent from this particular source for the Resort to purchase.[7] Because the Resort does not wish to pay more for effluent, it seeks to set aside the Commission's decision in an effort to force the continued operation of the WWTP.[8]

STATEMENT OF THE CASE

I. COMMISSION PROCEDURAL HISTORY.

BMSC filed a rate application in December 2008.[9] An evidentiary hearing was held on November 18, 23, 24 and 25, 2009.[10] The Commission issued Commission Decision No. 71865 on September 1, 2010.[11] This has been referred to as Phase 1.

On June 15, 2011, Boulders Homeowners Association ("BHOA") filed a motion at the Commission seeking to amend Decision No. 71865 (the Commission's decision in Phase I).[12] On July 6, 2011, the Resort filed a motion to

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[5] I.R. 114, C.R. A-296 at 28:3-8 **(App. 146)**.
[6] *Id.* at 28:6-8.
[7] *Id.* at 28:14-17.
[8] I.R. 114, C.R. B-3 at 118:2-119:21; I.R. 118, C.R. B-9 at 41:10-20 **(App. 254-55)**.
[9] I.R. 97, C.R. A-1 (Application).
[10] I.R. 114 – 117, C.R. B-3 3-6.
[11] I.R. 109, C.R. A-182 **(App. 48-116)** (Decision 71865).
[12] I.R. 110, C.R. A-204.

intervene in the Commission proceeding and requested a hearing.[13] On January 24, 2012, the Commission voted to reopen Decision No. 71865 pursuant to A.R.S. § 40-252, and directed its Hearing Division to conduct proceedings to address the issues related to the WWTP.[14] On January 26, 2012, the Resort's motion to intervene was granted.[15]

An evidentiary hearing was held on May 8, 2012.[16] There was briefing by the parties, and the Administrative Law Judge issued a recommended opinion and order.[17] The Commission, after considering the full record from Phase I and Phase II, issued Decision No. 73885, which ordered BMSC to close the WWTP and reaffirmed the surcharge mechanism discussed in Decision No. 71865.[18]

Wind P1 timely filed an application for rehearing, which was denied by operation of law.[19]

II. SUPERIOR COURT PROCEDURAL HISTORY.

The Resort filed a complaint against the Commission in Superior Court on May 31, 2013.[20] Concurrent with the filing of the complaint, the Resort filed a

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[13] I.R. 110, C.R. A-205.
[14] I.R. 114, C.R. A-296 at 3:1-3 **(App. 121)**(Decision 73885).
[15] I.R. 111, C.R. A-217.
[16] I.R. 118, C.R. B-9.
[17] I.R. 112, C.R. A-277.
[18] I.R. 114, C.R. A-296 **(App. 119-70)**.
[19] I.R. 114, C.R. A-297.
[20] I.R. 1 (Complaint).

Motion for Preliminary Injunction to stay Decision No. 73885.[21] The Resort also filed a direct appeal to this Court pursuant to A.R.S. § 40-254.01[22] and petitions for special action in both the State Supreme Court[23] and in Superior Court.[24]

On August 26, 2013, this Court concluded that it lacked jurisdiction over the appeal.[25] On August 27, 2013, the Supreme Court declined to accept jurisdiction and denied the Resort's request to preliminarily enjoin the Commission's order.[26]

On December 18, 2013, the Resort filed motions for partial summary judgment on Counts 2, 3, 4 and 5 of its Complaint.[27] On February 7, 2014, the Commission and BMSC responded and filed cross-motions for summary judgment.[28] Oral argument was heard on the summary judgment motions on April 1, 2014.

On June 2, 2014, the court entered a written ruling granting the Commission's cross-motion for summary judgment. A final judgment was entered

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[21] I.R. 18.
[22] *Wind P1 Mortgage Borrower LLC v. Arizona Corp. Comm'n* , No. 1CA-CC 13-0001 (App.2013).
[23] *Wind P1 Mortgage Borrower LLC v. Gary Pierce, et al.*, No. CV13-0236 SA (2013).
[24] Maricopa County Superior Court, *Wind P1 Mortgage Borrower LLC v. Arizona Corp. Comm'n*, No. LC 2013-000371-001.
[25] *Wind P1 Mortgage Borrower LLC v. Arizona Corp. Comm'n*, No. 1CA CC 13-0001, Order Re: Motion to Determine Jurisdiction (8/26/13).
[26] *Wind P1 Mortgage Borrower v. Gary Pierce, et al.,* CV 13-0236-SA
[27] I.R. 139-144.
[28] I.R. 150-153; I.R. 155-170.

on August 22, 2014 and was certified on September 23, 2014.[29] The Resort filed a notice of appeal on August 26, 2014.[30]

STATEMENT OF FACTS

Sewer utility service consists of transporting wastewater from its point of origin to a treatment facility, treating the wastewater, and then properly disposing of the resulting treated wastewater, which is called effluent.[31] BMSC delivers approximately eighty percent of its wastewater flows to the treatment plant at the City of Scottsdale.[32] BMSC treats up to 120,000 gallons per day ("gpd"), which represents about twenty percent of its wastewater flows, at the WWTP.[33] To dispose of the effluent produced at the WWTP, BMSC has a twenty-year Effluent Delivery Agreement ("Effluent Agreement"), executed in 2001, that requires BMSC to deliver all effluent produced by the WWTP to the Resort unless certain events occur, such as a Commission order requiring the plant to close.[34] The WWTP is situated less than one hundred feet from three homes and within one thousand feet of three hundred homes.[35]

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[29] I.R. 205-212.
[30] I.R. 206.
[31] I.R. 125, C.R. C-51at 2:6-7; I.R. 114, C.R. B-3 at 116:1-6.
[32] I.R. 125, C.R. C-42 at 1 ¶ 4 **(App. 190)** (Stipulation of Facts).
[33] *Id.* at 1 ¶ 3.
[34] I.R. 125, C.R. C-44, attach. A **(App. 196-209)**(Effluent Agreement).
[35] I.R. 125, C.R. C-42 at 1 ¶ 2 **(App. 121)**.

I. THE 2005 RATE CASE.

In 2005, BMSC filed a rate application at the Commission seeking a rate increase.[36] One of the most contentious issues in that proceeding involved allegations that objectionable odors were emanating from the entire BMSC system.[37] The BHOA intervened in the proceeding to testify about the severity of the odors.[38] In addition, the Commission received numerous public comments complaining about the smells.[39] The Resort's Director of Golf Operations, Tom McCahan,[40] appeared as a representative on behalf of the Resort and provided public comment:

> Over the past several years the Golden Door Spa, Club, Resort and various locations around the golf course have experienced intermittent smells and odors . . . . We believe this issue must completely be remedied for the future of our resort as well as our members and homeowners.[41]

Based on sworn testimony given during the proceeding, there appeared to be general agreement that the odor problems came from two separate sources: 1) an older lift station ("CIE lift station") and 2) the wastewater line that flows under Boulders Drive in the Boulders Subdivision.[42] Because of ongoing operational

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[36] I.R. 121, C.R. C-19 **(App. 3-47)** (Decision 69164).
[37] *Id.* at 30 **(App. 32)**.
[38] *Id.* at 4, n. 3 **(App. 6).**
[39] *Id.* at 30-31 (App. 32-33).
[40] Mr. McCahan appeared as the Resort's witness in 2008 Rate Case Phase 2.
[41] I.R. 114, C.R. A-296 at 45, n. 18 **(App. 163)**(Decision 73885); I.R. 114, C.R. B-3 at 65-68.
[42] I.R. 121, C.R. C-19 at 31:19-32:8 **(App. 33)** (Decision 69164).

problems with the CIE lift station, BMSC simply agreed to its removal.[43]

By contrast, determining a remedy for the odor problems associated with the line under Boulders Drive proved to be more complex. According to an engineer testifying on behalf of the Town of Carefree, the odors in BMSC's collection system were caused by two problems: 1) the long retention time that sewage sits in the Boulders line, thereby allowing the sewage to become septic, and 2) "positive pressure" between the CIE lift station and the WWTP, which was created by having pressurized lines in one part of the system and then switching to gravity-fed lines in another part of the system.[44] The testimony presented two possible solutions: 1) replacement of the gravity-flow lines with pressurized lines or 2) installation of fans and carbon filters to create a negative pressure filtration system within the gravity-fed portion of the system.[45]

The Commission ordered BMSC to adopt either of these two solutions or to develop an alternative remedy with the agreement of the other parties.[46] BMSC then hired a consultant, who proposed an alternative remedy: installing air jumpers between the manholes along Boulders Drive.[47] The other parties agreed to this

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[43] I.R. 109, C.R. A-182 at 40:20-23 **(App. 89)** (Decision 71865).
[44] I.R. 114, C.R. A-296 at 38:21-28 **(App. 156)** (Decision 73885).
[45] I.R. 114, C.R. B-3 at 33.
[46] I.R. 121, C.R. C-19 at 37 **(App. 39)**(Decision 69164).
[47] *Id.*

alternative,[48] and BMSC subsequently installed these items.[49]

II. 2008 RATE CASE (Phase I).

On December 19, 2008, BMSC filed another application for a rate increase ("Phase I").[50] Odors were again at issue. BMSC witness, Greg Sorenson, then BMSC's Vice President of Operations and Engineering, testified about BMSC's remediation efforts.[51] In compliance with the Commission's order in the 2005 rate case, BMSC had deactivated the CIE lift station.[52] To address the odor problems along Boulders Drive, BMSC had rerouted sewer lines and installed air-jumper pipelines at four locations along the street between manholes to allow air to flow with the sewage, thereby preventing it from escaping into the atmosphere.[53] To remedy additional odor problems later discovered on Quartz Valley Drive, BMSC had also constructed a new sewer line and grinder pump station to permit sewage to flow freely.[54]

BMSC had also undertaken additional measures that were not required by the 2005 rate case. BMSC had installed an odor scrubber at the plant, placed heavy rubber mats over grate openings covering treatment basins, and

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[48] I.R. 109, C.R. A-182 at 40:20-41:3 **(App. 89)** (Decision 71865).
[49] I.R. 119, C.R. C-1 at 4:24-5:3 **(App. 226)**(Sorensen Direct).
[50] I.R. 97, C.R. A-1 (Application).
[51] I.R. 118, C.R. B-9 at 107:17-18.
[52] *Id.* at 3:4-5.
[53] *Id.* at 4-5.
[54] *Id.* at 5:4-22.

commissioned a noise study to determine the source of noises emanating from the plant.[55] The noise study led to several projects aimed at reducing noises coming from the treatment plant.[56]

BMSC also purchased odor loggers, which are devices that are placed around the perimeter of a sewer plant to measure the amount of hydrogen sulfide in the air.[57] Mr. Sorenson stated that there were several instances in which the devices detected noticeable smells, but these incidents did not rise to the level of a violation of applicable odor regulations.[58] He further stated that the majority of the odors emanate from the WWTP and that closure would eliminate the vast majority of those odor concerns.[59] He acknowledged that, despite the remediation efforts undertaken by BMSC, odors still remain:

> I go out to the plant; I'm not used to working in a wastewater treatment plant, so my nose is, I would say, akin to what our customers' noses would be like. And I can certainly smell odors walking around that plant, in spite of us covering, sealing buildings, installing an additional odor scrubber on the plant, adding chemicals to the process to try and reduce the odors. *We've gone through virtually everything that we can do on that plant, and yes, there are still odors there.*[60]

Despite BMSC's efforts, Les Petersen, the BHOA's president, testified that odors from the WWTP plant continued to be very noticeable, and were

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[55] *Id.* at 6.
[56] *Id.*
[57] *Id.* at 7:13-24; I.R. 109, C.R. A-182 at 41:11-13**(App. 90)** (Decision No. 71865).
[58] I.R. 114, C.R. B-3 at 142:20-143:12 **(App. 183-84)**.
[59] *Id.* at 113, 114-115 **(App. 179-81)**.
[60] *Id.* at 161:14-25 **(App. 187)** (emphasis added).

objectionable to Boulders residents.[61] He further stated that noise from the WWTP was noticeable not only to nearby homes, but also to homes as far away as an estimated four hundred feet.[62] He further testified that, when the WWTP was constructed, it was expected to be a temporary wastewater treatment solution until another location could be secured further away from homes.[63]

During the 2008 rate case, the BHOA had worked in cooperation with BMSC to come up with a solution for the odor issues.[64] As a result of those discussions, BMSC and the BHOA agreed that the WWTP could be closed and entered into an agreement ("Closure Agreement").[65] The Closure Agreement provided that BMSC, subject to Commission approval, could implement a surcharge to recover the costs associated with closing the plant.[66] BMSC's obligations under the agreement were subject to a number of conditions, including the "[s]uccessful renegotiation of the Effluent Agreement with the Resort to allow termination of that agreement with little or no cost to BMSC upon closure of the treatment plant."[67]

Mr. Petersen had informed the Resort of the BHOA's efforts to close the

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[61] I.R. 121, C.R. C-22 at 5:14-16; I.R. 115, C.R. B-4 at 354:6-355:14 **(App. 237)**.
[62] *Id.*
[63] I.R. 114, C.R. B-3 at 144 **(App. 183)**, 161-62 **(App. 187-88)**.
[64] I.R. 121, C.R. C-22 at 6:20-24.
[65] *Id.*
[66] I.R. 125, C.R. C-43 at 3 ¶ vi **(App. 213)**(WWTP Closure Agreement).
[67] I.R. 110, C.R. A-204, attach. A ¶ C.

plant as early as December of 2008 and then again in mid-2009.[68] Nonetheless, the Resort elected not to intervene in Phase I of the 2008 Rate Case.

On September 1, 2010, the Commission issued Decision No. 71865, which granted BMSC an increase in rates and, among other things, found that the Closure Agreement between BMSC and BHOA concerning the WWTP provided "an appropriate and creative solution" to address ongoing odor issues related to the plant.[69] The Commission also established a surcharge mechanism to allow BMSC to recover certain costs associated with the decommissioning of the plant.[70]

III. 2008 RATE CASE (Phase II).

After the issuance of Decision No. 71865, BMSC and the BHOA renewed their efforts to negotiate with the Resort.[71] In the months that followed, BMSC, BHOA, and the Resort conducted discussions on several occasions; however, for reasons that are not apparent, discussions eventually ceased.[72]

On June 15, 2011, BHOA filed a motion at the Commission requesting that the WWTP be closed.[73] In its motion, the BHOA asserted that, despite what appeared to be BMSC's good faith efforts to negotiate with the Resort, the negotiations had reached an impasse, and BMSC and the Resort had been unable to

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[68] I.R. 126, C.R. C-56 at 39-42.
[69] I.R. 109, C.R. A-182 at 53:20-23 **(App. 102)**(Decision 71865).
[70] *Id.* at 54-55 **(App. 103-04)**.
[71] I.R. 125, C.R. C-44 at 7:3-10.
[72] *Id.*
[73] I.R. 110, C.R. A-204 at 1.

agree to a termination of the Effluent Agreement.[74]

On July 6, 2011, the Resort filed a motion to intervene in the Commission proceeding and requested a hearing to present evidence and legal arguments regarding the WWTP and the Effluent Agreement.[75] On January 24, 2012, the Commission voted to reopen Decision No. 71865 pursuant to A.R.S. § 40-252, and directed its Hearing Division to conduct proceedings to address the issues related to the WWTP.[76] On January 26, 2012, the Resort's motion to intervene was granted.[77]

At the hearing, the BHOA offered a stipulation of facts that was admitted without objection.[78] The stipulation provides that, if constructed today, the plant would require a setback of either five hundred feet (for a facility without odor, noise, and aesthetic controls) or at least one hundred feet (for a facility with full odor, noise, and aesthetic controls).[79] The WWTP is located less than one hundred feet from three homes and within one thousand feet of 200-300 homes, as well as certain dining and conference facilities at the Resort.[80] Numerous complaints have been raised by residents in the Boulders community regarding objectionable odors

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[74] *Id.*
[75] I.R. 114, C.R. A-296 at 2 **(App. 120)**(Decision 73885).
[76] *Id.* at 3 **(App. 121)**.
[77] *Id.*
[78] I.R. 125, C.R. C-42 **(App. 190-93)**(Stipulation of Facts); I.R. 118 C.R. B-9 at 30.
[79] I.R. 125, C.R. C-42 at 3 ¶14 **(App. 193)**.
[80] *Id.* at 1 ¶ 2 **(App. 190)**.

from the treatment plant.[81]

According to the Resort, closing the WWTP would have a significantly negative effect on its operations, because it would have to replace a portion (about fifteen percent) of the water supply for its golf courses at a cost that the Resort alleged to be prohibitive.[82] The Resort did not present any testimony refuting the presence of noises or odors.[83] In fact, all three of the Resort's witnesses acknowledged the presence of noticeable sewer odors.[84] The Resort's testimony instead focused on its efforts to find replacement effluent or other solutions.

According to the Resort, it attempted to work with BMSC and local residents to find a solution that would allow early termination of the Effluent Agreement, but the Resort was unable to identify a reasonable and affordable solution.[85] The Resort claimed to have evaluated a number of options including operating without BMSC's effluent through conservation measures, finding replacement water supplies, or building a closed treatment plant on the Resort's property.[86] Despite the variety of possibilities discussed by the Resort in its testimony, it concluded that each of the available alternatives would be

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[81] *Id.* at 2 ¶ 5 **(App.191)**.
[82] I.R. 125, C.R. C-44 at 9; C.R. C-45 at 4.
[83] I.R. 114, C.R. A-296 at 27:14-17 **(App. 145)**(Decision 73885).
[84] I.R. 118, C.R. B-9 at 63:13-16 **(App. 246)**, 66:5-11 **(App. 247)**, 83:16-18 **(App. 248)**, 95-96 **(App. 250-51)**.
[85] I.R. 125, C.R. C-44 at 8.
[86] I.R. 125, C.R. C-46 at 4-6.

significantly more expensive than the current Effluent Agreement.[87]

BMSC, in its testimony, reiterated its remediation efforts.[88] BMSC also testified that, in the spring of 2012, it had met with representatives from the Town of Cave Creek about the possibility of rerouting the wastewater flows from BMSC's system to Cave Creek's treatment facility; from there, the wastewater could be treated and then, if an effluent delivery line were built, sent to the Resort to replace the effluent that it now gets from BMSC.[89]

Although this is a possible option,[90] the costs to BMSC would likely be higher than the costs of purchasing additional treatment capacity from Scottsdale.[91] In addition, it would be necessary to construct an effluent delivery line to the Resort and to reroute a portion of BMSC's flows to the Cave Creek facility.[92] The costs reroute were estimated to be between $546,000 and $1.1 million, and the costs of a new effluent line were estimated to be between $1.3 million and $2.3 million.[93]

After the Administrative Law Judge had submitted a proposed order to the

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[87] I.R. 125, C.R. C-46 at 4-6, C-45 at 3-4, C.R. C-44 at 8, 9, C.R. C-51 at 11-12.
[88] I.R. 119, C.R. C-1 at 2-5.
[89] I.R. 118, C.R. B-9 at 117:7-118:22, 119:17, 120:2 **(App. 253-56)**.
[90] I.R. 126, C.R. C-53 at 1; I.R. 118, C.R. B-9 at 118:23 - 119:1 **(App. 254-55)**.
[91] I.R. 114, C.R. A-296 at 27:14-17 **(App. 145)**(Decision 73885).
[92] *See also* I.R. 118, C.R. B-9 at 116:23-118:22,119:2-120:2, **(App. 252-57)**121:13-123:24,136:18 - 140:10.
[93] I.R. 126, C.R. C-53 at 1.

Commission, the matter was scheduled for a Commission open meeting.[94] Commissioner Pierce, in a letter to the docket on April 5, 2013, requested that the matter be pulled from the agenda.[95] He urged the parties to meet and attempt to find a mutually acceptable solution.[96] The parties subsequently met, but were unable to reach agreement.[97]

The Commission, after considering the full record from Phase I and Phase II, issued Decision No. 73885, which orders BMSC to close the WWTP and reaffirms the surcharge mechanism discussed in Decision No. 71865.[98] The Commission concluded that continued operation of the WWTP, which is located in the midst of a residential neighborhood, would have a detrimental effect on the quality of life for residents within the Boulders community.[99]

The Resort filed a petition for rehearing of Decision No. 73885 pursuant to A.R.S. § 40-253, which was denied by operation of law.[100] To challenge the Commission's order, the Resort filed four different judicial actions in three different courts.[101] This appeal stems from the Resort's Superior Court complaint,

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[94] I.R. 113, C.R. A-277.
[95] I.R. 113, C.R. A-283 (Comm. Pierce Letter).
[96] *Id.*
[97] I.R. 113, C.R. A-284 (Status of Settlement Agree.).
[98] I.R. 114, C.R. A-296 at 46-51**(App. 164-69)** (Decision 73885).
[99] *Id.* at 38 **(App. 156)**.
[100] I.R. 114, C.R. A-297.
[101] Maricopa County Superior Court CV2013-007804, LC2013-000371-01; Court of Appeals 1 CA-CC 13-0001; Supreme Court CV 13-0236 SA.

which was filed pursuant to A.R.S. § 40-254.[102]

ISSUES PRESENTED

1. Does the Commission's constitutional and statutory authority empower it to require the closure of a sewer plant that emits offensive odors in a residential neighborhood?
2. Did the Superior Court correctly conclude that the Commission's closure order is completely unrelated to its constitutional authority?
3. Did the Superior Court properly conclude that the substantial evidence test is equivalent to the "clear and convincing" standard set forth in A.R.S. § 40-254(E)?
4. Is the Commission's order supported by substantial evidence?
5. If a *de novo* standard of review should have been applied, can Wind P1make a clear and convincing showing that the Commission's order was unreasonable?
6. Does the Commission's closure order offend the Contract Clauses of the state and federal constitutions?

ARGUMENT

I. STANDARD OF REVIEW.

On appeal, the Court of Appeals reviews the judgment of the Superior Court, not the Commission's decision.[103] In addition, the Superior Court's decision is

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[102] I.R. 1 (Complaint).

[103] *Phelps Dodge Corp, Inc. v. Ariz. Elec. Power Co-op, Inc.*, 207 Ariz. 95, 103, ¶16, 83 P.3d, 573, 581 (App.2004).

reviewed on the basis of the reasonable evidence standard.[104]

II. THE COMMISSION HAS THE AUTHORITY TO ORDER CLOSURE OF THE WASTEWATER TREATMENT PLANT.

Wind P1 argues that neither the Arizona Constitution nor the Commission's governing statutes in Title 40 gives the Commission the authority to order the closure of the WWTP, as directed in Decision No. 73885. This argument is an incorrect statement of the Commission's authority under the constitution, the statutes in Title 40, and applicable case law. It also mischaracterizes the facts of this case.

A. *The Superior Court Correctly Concluded That The Commission Has The Necessary Statutory Authority To Order Closure Of The WWTP.*

A.R.S. § 40-331(A) provides the Commission with express and unambiguous authority over the facilities of public service corporations:

> When the Commission finds that additions or ***improvements to or changes in the existing plant or physical property of a public service corporation ought reasonably to be made,*** or that a new structure or structures should be erected, to promote the security or convenience of its employees or the public, ***the commission shall make and serve an order directing that such changes be made*** or such structure be erected in the manner and within the time specified in the order. If the commission orders erection of a new structure, it may also fix the site thereof.

(Emphasis added). *See also* A.R.S. § 40-321(A) (granting Commission authority

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[104] *Marco Crane and Rigging v. Arizona Corp. Comm'n*, 155 Ariz. 292, 294, 746 P.2d 33, 35 (App.1987), *quoting Tucson Elec. Power* 132 Ariz. at 244, 645 P.2d at 235.

to oversee the "equipment, appliances, facilities, or service of any public service corporation"); A.R.S. § 40-361(B) (requiring public service corporations to maintain "equipment and facilities" as will be "in all respects adequate, efficient, and reasonable"). The Superior Court correctly concluded that the Commission has ample statutory authority to order the closure of the WWTP.[105]

The Resort argues that these statutes are vague and ambiguous and urges the Court to apply the rules of statutory construction. Far from vague or ambiguous, these statutes make it abundantly clear that the Commission has not only the authority but also the duty to protect the health, safety, and welfare of a public service corporation's customers. When statutory language is clear, unequivocal, and unambiguous, this court must give effect to the language and may not invoke the rules of statutory construction to interpret it.[106] These statutes clearly give the Commission the flexibility to fashion appropriate remedies to govern public service corporations.

In this case, the Commission addressed a unique, longstanding problem in a careful and painstaking manner. As noted above, the odor problems have existed at least since 2005, and the Commission did not order closure of the plant before

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[105] I.R. 197 at 4-5 (Min. Entry).
[106] *U.S. West Commc'n, Inc. v. City of Tucson*, 198 Ariz. 515, 520, ¶8, 11 P.3d 1054, 1059 (App. 2000).

attempting to find a remedy to the uncontroverted odor issues.[107] Specifically, in response to the Resort's argument that the Commission's closure of the plant would reflect an overreach of government power, the Commission concluded that its actions over the years to address ongoing odor complaints were

> taken in a manner that reflects the least amount of governmental intrusion possible on the Company's operations, while at the same time attempting to provide for the "convenience, comfort and safety" of the Company's customers by protecting them from noises and noxious odors that have pervaded the community for years. Our order in this proceeding is hopefully the final step in this lengthy process . . . .[108]

The Commission's action in this matter is completely consistent with its statutory authority. Moreover, as the Superior Court also noted, the Resort concedes that the Commission has the authority to order the Company to mitigate odor problems at the plant.[109] The closure order differs from other odor-remediation remedies only in degree.[110]

B. *The Commission's Statutory Authority Has Not Been Repealed By Title 49*

In its Opening Brief, Wind P1 argues that the Commission's authority to regulate the WWTP, as it did in this case, has been eliminated by the Legislature's creation of the Arizona Department of Environmental Quality ("ADEQ") and its

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[107] I.R. 197 at 2 (Min. Entry).
[108] I.R. 114, C.R. A-296 at 46:8-12 **(App. 164)**(Decision 73885).
[109] I.R. 197 at 4.
[110] *Id.*

enabling statutes.[111] Wind P1 did not raise this issue before the Superior Court. Issues that are not raised below will not be considered for the first time on appeal.[112] The Resort has waived this issue, and it should not be considered here.

However, even if the issue had been timely raised by the Resort, which the Commission disputes, it has no merit. The Resort's argument implies that with the passage of the legislation creating ADEQ, the statutory authority of the Commission to regulate the quality of service of the public service corporations is somehow repealed. It is well settled law that repeals by implication are not favored, and will not be indulged if there is any other reasonable construction.[113]

To the extent possible, courts must enforce all statutes that have been duly enacted. In so doing, it is the court's "obligation to harmonize related statutes," and this obligation "'applies even where the statutes were enacted at different times, and contain no reference one to the other.'"[114] Furthermore, it is immaterial to this endeavor that the statutes are found in different titles.[115]

The ADEQ was established as the state's environmental regulatory agency under the Environmental Quality Act of 1986 to serve as a separate, cabinet-level

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[111] Wind P1's Op. Br. at 21-25.
[112] *Allstate Indemnity Company v. Ridgely*, 214 Ariz. 440, 442, ¶7, 153 P.3d 1069, 1071 (App.2007).
[113] *Arizona Corp. Commission v. Catalina Foothills Estates*, 78 Ariz. 245, 247, 278 P.2d 427, 428 (1954).
[114] *State v. Buhman,* 181 Ariz. 52, 56, 887 P.2d 582, 586 (App.1994) (quoting *State ex rel. Larson v. Farley,* 106 Ariz. 119, 122, 471 P.2d 731, 734 (1970)).
[115] *Larson,* 106 Ariz. at 122, 471 P.2d at 734.

agency to administer all of Arizona's environmental protection programs. ADEQ's mission is to protect and enhance public health and the environment in Arizona.[116] The Commission's role to regulate public service corporations and protect the health, safety and welfare of the customers of public service corporations is not in conflict with nor does it supplant the role of ADEQ.

Furthermore, the Resort's ADEQ arguments miss the point: the Commission's authority goes beyond ordinary health and safety concerns, and includes matters related to the "comfort and convenience" of customers and the public. *See, e.g.,* A.R.S. §§ 40-202, -321, -331; *see also* Ariz. Const. art. XV, § 3. As this Court has previously stated, "the regulatory powers of the Commission are not limited to making orders respecting the health and safety, but also include the power to make orders respecting comfort, convenience, adequacy and reasonableness of service . . . ." *See Arizona Corp. Comm'n v. Palm Springs Util. Co., Inc.,* 24 Ariz. App. 124, 536 P.2d 245 (App.1975).[117]

According to the Resort, the BHOA's request to the Commission to close the plant is essentially a nuisance claim over which the Commission has no jurisdiction. But the fact that the Commission's action may also have averted what

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[116] http://www.azdeq.gov/function/about/index.html

[117] *See also San Diego Gas & Elec. Co. v. Superior Court*, 13 Cal.4th 893, 920 P.2d 669 (1996) (noting that public utilities commission has "comprehensive jurisdiction over questions of public health and safety arising from utility operations").

may be a nuisance is not of consequence and does not affect the Commission's ability to exercise its lawful jurisdiction in this case. The Commission acted pursuant to its lawful authority to remedy an ongoing deficiency with BMSC's facilities, and the Superior Court's judgment upholding that action should be affirmed.

C. *The Commission May Require Public Utilities To Achieve Quality Of Service Standards That Exceed Applicable Health And Safety Requirements*

The Resort argues that the Commission cannot require a utility to close a plant unless the plant is violating some specific regulatory rule or standard.[118] The Resort further asserts that the WWTP is operating within all applicable regulatory requirements and that the Commission's closure order, therefore, falls outside of its regulatory authority as set forth in A.R.S. §§ 40-321, -331, and -361.

This argument has already been considered and rejected by the Court of Appeals in *Arizona Corp. Comm'n v. Palm Springs Util. Co., Inc.*[119] In that case, the court upheld the Commission's power to require a utility company to provide water that *exceeded* applicable water quality standards."[120] The court further recognized that, "in regulating public service corporations the Commission might accomplish some goals by the use of rules and regulations of general applicability

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[118] Wind P1's Op. Br. at 16, 19.
[119] 24 Ariz.App. 124, 536 P.2d 245.
[120] *Palm Springs*, 24 Ariz.App. at 129-30, 536 P.2d at 250-51.

but *would have to accomplish others by the use of orders pertaining to particular situations or to particular public service corporations."*[121]

In *Palm Springs,* the Commission had received several customer complaints about the quality of water provided by a water company. The Commission's witness, a State Health Department engineer, testified that the water met all mandatory requirements set by the Department and was safe to drink.[122] He also testified, however, that the water was neither palatable nor aesthetically pleasing, and had a corrosive effect on plumbing.[123] Despite the fact that the water was safe to drink and met all mandatory requirements, the Commission entered an order mandating improvements, which was upheld by the Court of Appeals in *Palm Springs.*[124]

The Resort's contention—that the Commission cannot enter an order to remedy a service problem if the facility is otherwise in regulatory compliance—is simply incorrect, and is completely undercut by the holding in *Palm Springs*. In elaborating on the constitutional and statutory provisions concerning the Commission's authority, the court noted that two pertinent generalizations may be drawn:

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[121] I.R. 114, C.R. A-296 at 39 **(App. 157)**(Decision 73885), quoting *Palm Springs*, 24 Ariz. at 128, 536 P.2d at 249 (emphasis added).
[122] *Palm Springs*, 24 Ariz. App. at 126, 536 P.2d at 247.
[123] *Id.*
[124] *Id.* at 130, 536 P.2d at 251.

> First, the regulatory powers of the Commission are not limited to making orders respecting the health and safety, but also include the power to make orders respecting comfort, convenience, adequacy and reasonableness of service, which is what was done by the Commission in the decision under consideration. Second, both in the constitution and the statutes the lawmakers recognized...that the Commission...would have to accomplish [other goals] by the use of orders pertaining to particular situations and particular public service corporations.[125]

Palm Springs has been good authority in Arizona for nearly forty years. The Resort cannot successfully argue that it is not applicable to this case. Under the facts of this case, the Superior Court correctly concluded that the Commission may require the WWTP to close.

D. *The Commission's Constitutional Authority Encompasses Both Ratemaking And Non-Ratemaking Authority And Grants The Commission The Authority To Order Plant Closure.*

The Superior Court concluded that the Commission's constitutional authority does not extend beyond ratemaking and thus does not extend to the Commission's closure order in this case.[126] This is an incorrect reading of the Commission's constitutional authority, as the language of article XV, section 3 clearly extends beyond ratemaking.

The Commission's constitutional authority under section 3 contains *two separate* authorizations, one for ratemaking and the other for non-ratemaking:

> The Corporation Commission shall have full power to, and shall, prescribe just and reasonable classifications to be used and just and reasonable rates and charges to be made and collected, by public

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[125] *Id.* at 128, 536 P.2d at 249.
[126] I.R. 197 at 3.

> service corporations within the State for service rendered therein, ***and make reasonable rules, regulations, and orders, by which such corporations shall be governed in the transaction of business within the State,*** and may prescribe the forms of contracts and the systems of keeping accounts to be used by such corporations in transacting such business, and ***make and enforce reasonable rules, regulations, and orders for the convenience, comfort, and safety, and the preservation of the health, of the employees and patrons of such corporations;*** Provided, that incorporated cities and towns may be . . .

(Emphasis added). The first section of highlighted text refers to the Commission's ratemaking authority, which courts describe as the Commission's exclusive authority.[127] The second section of highlighted text, however, refers to the Commission's constitutional, non-ratemaking authority.[128] To conclude that section 3 does not contain any authority beyond ratemaking ignores this plain language.[129]

This conclusion is also supported by *Palm Springs*. Wind P1 argues that *Palm Springs* cannot be used to establish the Commission's authority because the

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[127] *See Arizona Corp. Comm'n v. State ex rel. Woods,* 171 Ariz. 286, 830 P.2d 807 (1992); *Corp. Comm'n v. Pacific Greyhound Lines*, 54 Ariz. 159, 173, 94 P.2d 443, 449 (1939).

[128] *See Palm Springs*, 24 Ariz.App. at 129-30, 536 P.2d at 250-51.

[129] The Commission is asking the court to uphold the Superior Court's decision. As a prevailing party not seeking to expand its own rights, the Commission is not required to file a cross-appeal. Arizona's long-settled rule is that, "if [an] appellee in its brief seeks only to support or defend and uphold the judgment of the lower court from which the opposing party appeals, a cross-appeal is not necessary." *Maricopa Cty. v. Corp. Comm'n*, 79 Ariz. 307, 310, 289 P.2d 183, 185 (1955). A cross appeal is required only if the appellee seeks "to attack [the] judgment with a view of either enlarging his rights thereunder or lessening the rights of his adversary." *Id.* (internal quotations omitted). Merely seeking to support the Superior Court's judgment for reasons not relied upon by it "is not attempting to enlarge [an appellee's] own rights or lessen those of [an] adversary," and a cross-appeal is unnecessary. *Santanello v. Cooper*, 106 Ariz. 262, 265, 475 P.2d 246, 249 (1970); *see also* Ariz. R. Civ.App. P. 1, 13, State Bar Committee Note.

parties in that case did not dispute the Commission's authority, and because the authority issue was not explained by the court.[130] This characterization is simply incorrect: the court used nearly two full pages to explain its view of the Commission's authority under article XV, section 3 and the applicable statutes (A.R.S. §§ 40-202(B) and -321(A)).[131] The court specifically recognized that the authority found in the subsequent portion of section 3 has been interpreted as authority held concurrently by the legislature and the Commission.[132] This concurrent authority has also been acknowledged by the Arizona Supreme Court in *Woods*.[133]

Finally, the Commission does not concede that the decision is unrelated to ratemaking. The Commission's decision in this matter occurred *in a rate case*.[134] Furthermore, the decision to close a plant has implications for the utility's rate base—and therefore, for the utility's rates. *See Miller v. Ariz. Corp. Comm'n,* 227 Ariz. 21, 28-29, 251 P.3d 400, 407-08 (App.2011). As our Supreme Court has recognized, the Commission's ratemaking authority extends to every necessary step in ratemaking,[135] and decisions regarding plant have a special connection to

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[130] Wind P1's Op. Br. at 13.
[131] *Palm Springs*, 24 Ariz.App. at 127-28, 536 P.2d at 248-49.
[132] *Id.*
[133] *Woods,* 176 Ariz. 286, 292, 830 P.2d 807, 813.
[134] *See* I.R. 109, C.R. A-182 (Decision 71865), I.R. 114, C.R. A-296 (Decision 73885).
[135] *Woods*, 171 Ariz. at 294, 830 P.2d at 815.

ratemaking.[136]

III. THE SUPERIOR COURT CORRECTLY DETERMINED THAT THE SUBSTANTIAL EVIDENCE TEST IS THE APPROPRIATE STANDARD OF REVIEW UNDER A.R.S. § 40-254(E).

Wind P1 challenged the Commission's entry of Decision No. 73885 pursuant to A.R.S. § 40-254. That statute provides that "the burden of proof shall be upon the party adverse to the commission . . . to show by clear and satisfactory evidence that [the Commission's order] is unreasonable or unlawful."[137] "Clear and satisfactory" means "clear and convincing," which is a higher standard of proof than "preponderance of the evidence."[138] The nature of this elevated standard of proof imposes *deference* to the Commission's resolution of factual issues. *See Grand Canyon Trust v. Arizona Corp. Comm'n*, 210 Ariz. 30, 34, ¶11, 107 P.3d 356, 360 (App.2005) (equating the "clear and convincing" standard with the "substantial evidence" test).

The leading case on this issue is *Grand Canyon Trust v. Arizona Corp. Comm'n*, wherein the Arizona Court of Appeals addressed the standard of review under A.R.S. § 40-254 in the context of summary judgment. That case articulates the governing standard:

[W]hen the plaintiff challenges a factual determination of the

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[136] *Miller,* 227 Ariz. at 28, ¶27-30, 251 P.3d at 407; *see also* Ariz. Const. art. XV, § 14.

[137] A.R.S. § 40-254(E).

[138] *Tucson Elec. Power Co. v. Arizona Corp. Comm'n*, 132 Ariz. 240, 243, 645 P.2d 231, 234 (1982).

> Commission, the superior court is not free to overturn it unless the plaintiff demonstrates by "clear and convincing" evidence that the Commission's determination is unreasonable. *In making this assessment Arizona courts uphold such determinations if they are supported by substantial evidence.*[139]

In that case, the Court expressly equated the "clear and convincing" standard with the "substantial evidence" test.[140]

Wind P1, however, proposes a *de novo* standard of review, claiming that the Superior Court is entitled to reweigh the evidence and reach an independent conclusion.[141] To support its argument, Wind P1 relies primarily upon older cases that deal with certificates of convenience and necessity ("CC&Ns") in the transportation industry.[142] These cases are distinguishable from the present matter: they are dated, they address CC&Ns (a uniquely statutory creation),[143] and they deal with an industry that is no longer regulated by the Commission.

By relying on these CC&N cases, Wind P1 simply draws the scope of the deference owed to the Commission too narrowly, in effect arguing that courts should accord deference only to Commission rate decisions and engage in *de novo* review of everything else. True, there are cases—many of them dating from the 1930s—that adopt *de novo* review of Commission orders, *but the vast majority of them are CC&N cases.* That these older cases establish *de novo* review in the

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[139] *Grand Canyon Trust,* 210 Ariz. at 34, ¶11, 107 P.3d at 360 (emphasis added).
[140] *Id.*
[141] Wind P1's Op. Br. at 27.
[142] *Id.* at 27-29.
[143] A.R.S. § 40-281 *et seq.*

context of CC&Ns does not extend to all Commission orders. Wind P1 essentially characterizes deference as the exception (*i.e.,* only for rate cases) and *de novo* review as the rule. This is exactly the opposite of Arizona's constitutional construct for the Commission: *de novo* review is the exception (*i.e.,* only for CC&N cases) and deference is the rule.

Grand Canyon Trust was not a rate case, so Wind P1's claim that the "substantial evidence" test is applicable only to rate cases is erroneous. Moreover, there are other cases that accord heightened deference to Commission decisions, even in circumstances where the Commission is not establishing rates. *See Woods,* 171 Ariz. at 294, 830 P.2d at 815 (affiliated interest rules); *Miller,* 227Ariz. at 28, ¶27, 251 P.3d 407 (renewable energy rules); *Marco Crane and Rigging v. Arizona Corp. Comm'n*, 155 Ariz. 292, 294, 746 P.2d 33, 35 (App.1987) (tariffs). Finally, not all CC&N cases use a strict *de novo* standard. In *Arizona Water Co. v. Arizona Corp. Comm'n,* the court used the following deferential standard:

> When the Commission has a choice among CC&N applications, we will not disturb "the wide discretion vested unless it appears that its decision was clearly arbitrary or capricious or in disregard of legal rights. "This is because the Commission was established to make such decisions and has developed the expertise to do so, which is not shared by the courts. ***"That a judge of the superior court, or that this court, might be of the opinion that a different order should have been entered than that which the department did enter, does not, of***

itself, warrant reversal . . . ."[144]

Wind P1 also argues that the Superior Court's reliance on *Grand Canyon Trust* was erroneous because the standard of review was not at issue in *Grand Canyon Trust.*[145] This statement is simply incorrect. The first section of the "Discussion" portion of the *Grand Canyon Trust* case is entitled "Standard of Review."[146] The court discussed at length the argument concerning the standard of review, which the appellant claimed had been applied incorrectly by the Superior Court. The Resort's characterization of *Grand Canyon Trust* is without merit.

In this case, the Commission is operating within its unique expertise (both ratemaking and non-ratemaking) under article XV, section 3 of the Arizona Constitution and Title 40 of Arizona's statutes. Arizona law clearly recognizes a heightened standard of review when a Commission decision is based on a constitutional grant of authority, such as the Commission's ratemaking authority. *See Woods*, 171 Ariz. at 297, 830 P.2d at 818; *Tucson Electric*, 132 Ariz. at 243-44, 645 P.2d at 234-34; *Simms v. Round Valley Light & Power Co.,* 80 Ariz. 145, 154, 294 P.2 378, 384 (1956). But judicial deference is not limited to instances in which

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[144] *Arizona Water Co. v. Arizona Corp. Comm'n,* 217 Ariz. 652, 659, ¶23, 177 P.3d 1224, 1231 (App.2008) (citing *Arizona Corp. Comm'n v. Fred Harvey Transp. Co.,* 95 Ariz. 185, 388 P.2d 236 (1964))(emphasis added).
[145] Wind P1's Op. Br. at 30.
[146] 210 Ariz. at 33, 107 P.3d at 359.

the Commission is engaged in ratemaking.[147] Deference is appropriate whenever the Commission is engaged in an endeavor that is related to its special expertise.[148] The present case is clearly such an endeavor.

IV. THE SUPERIOR COURT CORRECTLY DETERMINED THAT THE OWENS AFFIDAVIT IS INADMISSIBLE UNDER APPLICABLE ARIZONA LAW.

In response to the Commission's cross-motion for summary judgment, Wind P1 offered the affidavit of Robert L. Owens, an engineer. The Commission objected to the admission of the affidavit, and the Superior Court agreed that the affidavit is not admissible.[149] The decision whether to admit new evidence in an appeal of a Commission order is left to the discretion of the Superior Court.[150] The trial court correctly exercised its discretion in denying the admission of the affidavit, and this Court should sustain its ruling on this issue.

A. *The Owens Affidavit Is Inadmissible Because It Offers an Opinion On A Question of Law*

The Owens' affidavit is inadmissible as expert testimony because it offers an opinion on the ultimate legal issue presented in this case: the sufficiency of the evidence. *See Webb v. Omni Block, Inc.*, 216 Ariz. 349, 355, ¶19-20,166 P.3d 140, 146 (App.2007). In Wind P1's supplemental statement of facts

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[147] *See Grand Canyon Trust,* 210 Ariz. at 37, ¶29, 107 P.3d at 363.
[148] *See id.*
[149] I.R. 197 at 5 (Min. Entry).
[150] *Arizona Corp Comm'n v. Citizens Util. Co.*, 120 Ariz. 184, 584 P.2d 1175 (App.1978).

offered in response to the Commission's Cross Motion for Summary Judgment, Wind P1 set forth three statements (nos. 56, 57, and 58) that are attributed to the Owens affidavit.[151] All three of these statements draw conclusions about the sufficiency of the evidence in support of the Commission's decision. As *Grand Canyon Trust* clearly states, the evaluation of the sufficiency of the evidence rests with the Superior Court.[152]

The Superior Court correctly concluded that the affidavit essentially provides Mr. Owens' opinion on the sufficiency of the evidence in the Commission's record.[153] On its face, the Owens affidavit sets forth conclusions of law, not statements of fact. Accordingly, the Superior Court did not err in concluding that the affidavit is inadmissible.

B. *The Resort Cannot Offer Evidence In The Superior Court That Was Not Available In The Proceeding Before The Commission*

In an appeal of a Commission order, the Arizona Supreme Court has consistently held that, although new evidence may be presented to the Superior Court, there is a difference in evidence that was in existence or available at the time of the hearing before the Commission and evidence that comes into existence

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[151] I.R. 175-76.

[152] 210 Ariz. at 34, ¶13, 107 P.3d at 360.

[153] *See, e.g.,* I.R. 176 at ¶ 4 ("Based on the information listed above, there is insufficient information to determine the cause of the odors within the Boulders area . . . ."); *id.* at ¶ 9 ("For the same reasons stated above, there is insufficient information to determine whether the WWTP will eliminate or even measurably improve odor levels in the Boulders residential areas . . . .").

after the hearing. Evidence of events occurring subsequent to the Commission hearing is not admissible.[154]

In Mr. Owens' affidavit, he states that he reviewed the record that was created in the proceeding before the Commission. Clearly, this review occurred after the conclusion of the Commission's proceeding, as the documents that he purportedly reviewed encompass every stage of the proceeding before the Commission, including the resulting Commission order.[155] Mr. Owens' statements concern matters that were not in existence at the time of the Commission's hearing, and are therefore inadmissible pursuant to A.R.S. § 40-254.[156] Although the Superior Court did not rely on this principle in its Minute Entry,[157] this argument nonetheless provides an alternative ground to support the Superior Court's determination.

Tellingly, while arguing that the Superior Court erred in denying admission of the affidavit, Wind P1 does not mention *Tucson Electric*.[158] Instead, basically admitting that the affidavit does not meet the legal test for admissible new

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[154] *Tucson Electric*, 132 Ariz. 240, 645 P.2d 231, citing *Church v. Arizona Corp. Comm'n,* 94 Ariz. 107, 382 P.2d 222 (1963); *Gibbons v. Arizona Corp. Comm'n*, 75 Ariz. 214, 254 P.2d 1024 (1953).
[155] I.R. 176, attach. A at 2-3 (Owen Affidavit).
[156] *Id.* at ¶ 4, 9.
[157] Although the Superior Court cited and correctly quoted *Tucson Electric* on this point of law, the court appears to have assumed, without deciding, that the affidavit was admissible new evidence under A.R.S. § 40-254. I.R.197 at 5.
[158] Wind P1's Op. Br. at 31-34.

evidence before the Superior Court, Wind P1 states that the affidavit "was further offered per ARCP 56(e) to demonstrate that (Decision No. 73885) was unreasonable . . . because the Commission *lacked information* that is material to the reasonableness of its decision . . . ."[159] By offering the affidavit, Wind P1 now purports to provide the alleged missing information (in other words, new evidence). Furthermore, this new evidence is provided through the affidavit of an expert who did not testify at the Commission's hearing and who formed his opinion *after the completion* of the hearing. Clearly, the affidavit concerns matters that occurred subsequent to the Commission's hearing. It is therefore inadmissible under *Tucson Electric.*

C. *Mr. Owens' Testimony Is Not Admissible Because The Resort Did Not Identify This Witness In Its Disclosure Statement*

Rule 26.1 requires parties to disclose the names of expert witnesses and the scope of each expert's testimony at the outset of litigation. The disclosure statement is the primary vehicle by which a party is informed of the facts and law upon which its opponent relies. Thus, it should fairly expose the facts and issues to be litigated, as well as the witnesses and exhibits to be relied upon.[160] The duty to disclose is continuing and ongoing.

Rule 37(c) provides that "[a] party who fails to timely disclose information

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[159] Wind P1's Op. Br. at 31 (emphasis added).
[160] *Bryan v. Riddel*, 178 Ariz. 472, 477, 875 P.2d 131, 136 (1994).

required by Rule 26.1 shall not, unless such failure is harmless, be permitted to use as evidence at trial, at a hearing, *or on a motion*, the information or witness not disclosed, except by leave of court for good cause shown." (Emphasis added). Delay, standing alone, does not necessarily establish prejudice. Every late disclosure will involve some delay, but the relevant question must be whether it is harmful to the opposing party or to the justice system.[161]

It was unfair and prejudicial for the Resort to attempt to add this new evidence so late in the Superior Court proceeding. The documents that Mr. Owens purports to have reviewed have been in existence since at least 2013. The Commission's position—that there is substantial evidence in the record to support the Commission's Order—has not changed since the outset of this litigation. The Resort cannot reasonably claim that the Owens affidavit was prepared in response to some new position of the Commission.

Accordingly, the Superior Court correctly determined that the Owens affidavit is inadmissible.

V. THE SUPERIOR COURT CORRECTLY DETERMINED THAT THE COMMISSION'S DECISION IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

In its Opening Brief, Wind P1 argues that disputed issues of fact preclude

[161] *Marques v. Ortega*, 231 Ariz. 437, 442, ¶20, 296 P.3d 100, 105 (App.2013).

summary judgment for the Commission.[162] Simply stated, Wind P1 disagrees with some of the Commission's factual findings and claims that its mere opposition to these findings creates disputed issues of fact. For several reasons, this Court should reject Wind P1's argument.

In the context of an appeal under A.R.S. § 40-254, Wind P1 cannot establish a dispute of fact merely by stating that it disputes the Commission's factual findings. The *Grand Canyon Trust* Court succinctly explained the applicable standards in the context of summary judgment:

> Because the superior court resolved the action by motion [for summary judgment], and the facts in the affidavit were not contested, we presume the truthfulness of the facts contained therein. *We do not, however, presume the truthfulness of the Trust's factual allegations that were determined adversely to the Trust by the Commission.* Instead, we determine, as presumably did the superior court, whether those determinations were supported by *substantial evidence*.[163]

"[I]f two inconsistent factual conclusions could be supported by the record, then there is substantial evidence to support an administrative decision that elects either conclusion."[164]

As determined correctly by the Superior Court, the question of whether substantial evidence supports the Commission's order does not raise material

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[162] Wind P1 Op. Br. at 34-49.
[163] 210 Ariz. at 34, ¶13, 107 P.3d at 360 (emphasis added).
[164] *DeGroot v. Ariz. Racing Comm'n,* 141 Ariz. 331, 336, 686 P.2d 1301, 1306 (App.1984).

issues of fact, but instead presents a question of law.[165] Under this standard, Wind P1's alleged disputed facts are not disputed facts at all. Wind P1 cannot create an issue of "disputed fact" to preclude summary judgment merely by asserting that it disagrees with the Commission's factual findings. The Commission's factual determinations will be set aside only if they are not supported by substantial evidence, and that inquiry is a question of law, not an issue of fact.[166]

In this case, the evidence clearly supports the conclusion that the WWTP emits offensive odors. In Phase I of the 2008 rate case, BHOA president Les Peterson testified that after the remediation efforts were completed, odors and noises still remained and the BHOA concluded that the treatment plant was the primary source of remaining odors.[167] In the Phase II hearing before the Commission, the BHOA again presented evidence to establish that the WWTP emits offensive odors. This evidence was offered in a stipulation that was admitted *without Wind P1's objection.*[168] Even more significant, the Resort's own witnesses acknowledged the presence of offensive odors,[169] and one of its witnesses expressly

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[165] *See Grand Canyon Trust*, 210 Ariz. at 34, ¶11, 107 P.3d at 360, *citing Havasu Heights Ranch & Dev. Corp. v. Desert Valley Woods Prods., Inc.,* 167 Ariz. 383, 387, 807 P.2d 1119, 1123 (App.1990).
[166] *Grand Canyon Trust,* 210 Ariz. at 34, ¶11, 107 P.3d at 360.
[167] Phase I transcript, Vol II 354:21-25- 355:1-3; 11-18.
[168] I.R. 125, C.R. C-42 **(App. 190-92)**(Stipulation of Facts).
[169] Appx., Ex. D, Tr. at 63:13-16 **(App. 246)**, 66:5-11**(App. 247)**, 83:16-18 **(App. 248)**, 95-96 **(App. 250-51)**.

acknowledged that the odors emanate from the treatment plant.[170] On this record, one cannot seriously argue that the evidence fails to establish that the WWTP smells.

Faced with evidence that establishes the WWTP's offensive odors, Wind P1's tactic throughout this litigation has been to argue that one cannot ascertain if the odors are actually offensive without some sort of "odor measurement," engineering study, or expert testimony. Wind P1 essentially argues that the lay testimony is insufficient, positing that expert testimony is required in order to establish the presence of odors.[171] Such might have been the case had the Resort proffered expert testimony (or any testimony) to rebut the lay testimony, but it did not.[172] As Wind P1 concedes, it has not presented any evidence concerning the odors or noise at the plant.[173]

The BHOA, having provided evidence establishing the undisputed presence of offensive odors at the WWTP, was not required to then present additional evidence to numerically measure the odors. If the Resort, in response to the BHOA's case, wanted to assert that the odors were not offensive according to some odor standard, it was the Resort's burden to offer evidence in support of that assertion. It was not the BHOA's burden before the Commission—nor was

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[170] *Id.* at 65:4-12.
[171] Wind P1's Op. Br. at 35.
[172] *See Layton v. Yankee Caitheness Joint Venture*, 774 F.Supp. 576, 579-80 (D.Nev.1991). *See also* I.R. 186 at 7 (Comm'n Reply Sum.J. Counts 1, 2, 3).
[173] Wind P1's Op. Br. at 32-34, fns 12, 13.

it the Commission's burden in Superior Court—to rebut evidence that the Resort failed to produce.

All that the Resort may do, at this late stage of the proceedings, is to argue that the evidence presented is somehow deficient. But to the contrary, substantial evidence clearly supports the Commission's decision. The Court should reject Wind P1's arguments and affirm the Superior Court's judgment.

VI. EVEN UNDER A *DE NOVO* STANDARD OF REVIEW, THE COMMISSION WOULD STILL BE ENTITLED TO SUMMARY JUDGMENT.

Wind P1 argues that the Superior Court should have used the *de novo* standard of review[174] set forth in *Corp. Comm'n of Ariz. v. People's Freight Line*[175] and *Ariz. Corp. Comm'n v. Reliable Transp. Co.*[176] Even if the Superior Court adopted the wrong standard—which the Commission does not concede—the Commission is still entitled to summary judgment. Even under *de novo* review, Wind P1 cannot show, by a clear and convincing standard, that the Commission's decision is unreasonable.

A. *The Resort's Argument On The Burden Of Proof Is Incorrect*

The Resort in its Opening Brief argues that the Commission did not meet its

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[174] *Id.* at 27.
[175] *Corp. Comm'n of Ariz. v. People's Freight Line,* 41 Ariz. 158, 16 P.2d 420 (1932).
[176] *Ariz. Corp. Comm'n v. Reliable Transp. Co.,* 86 Ariz. 363, 346 P.2d 1091 (1959).

burden of proof concerning Decision No. 73885.[177] To the contrary, Wind P1 has the burden of proof, in its appeal of Decision No. 73885, to prove by clear and convincing evidence that the decision is unreasonable or unlawful.[178]

B. *The Resort's Summary Judgment Analysis Is Incomplete*

Wind P1 cites *United Bank of Arizona v. Allyn*[179] for the proposition that any evidence or reasonable inference contrary to the moving party's material facts will preclude summary judgment.[180] However, Wind P1 fails to acknowledge *Orme School v. Reeves*,[181] the Arizona Supreme Court's leading decision on summary judgment. *Orme School* is neither cited nor discussed in the opening brief.

In *Orme School*, the Arizona Supreme Court held that motions for directed verdict and motions for summary judgment share the same underlying theory: either motion should be granted if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense.[182] A motion for summary judgment should not be denied simply on the speculation that some slight doubt might turn into a real controversy

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[177] Wind P1 Op. Br. at 34-49.
[178] *See Tucson Electric*, 132 Ariz. 240, 645 P.2d 231.
[179] *United Bank of Arizona v. Allyn,* 167 Ariz. 191, 805 P.2d 1012 (App. 1990).
[180] Wind P1 Op. Br. at 10.
[181] *Orme School v. Reeves,* 166 Ariz. 301, 802 P.2d 1000 (1990).
[182] *Id.*

in the midst of trial.[183] "[T]he mere existence of a scintilla of evidence is insufficient;" there must instead be evidence on which a jury could reasonably find for the proponent of a claim.[184]

In ruling on a motion for summary judgment, the Superior Court must evaluate the evidence to some extent in order to determine if the necessary quantum of evidence has been produced.[185] Wind P1, to defeat the Commission's motion for summary judgment, has the burden to show by clear and convincing evidence that the Commission's order is unreasonable. To meet this burden, it must present something beyond mere speculation or possible doubt. In light of the facts on the record, this is a showing that Wind P1 cannot achieve.

The Commission has addressed BMSC's odor problems in three separate evidentiary proceedings: the 2005 rate case and Phases I and II of the 2008 rate case. In its cross-motion for summary judgment, the Commission provided numerous factual citations to the records of these proceedings. It also provided the factual stipulation that established (without objection by the Resort) that objectionable odors emanate from the WWTP, that odors from the treatment plant are noticeable on the golf course, and that the WWTP would not comply with

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[183] *Orme School* at 308, 802 P.2d at 1007.
[184] *Id.* at 309, 802 P.2d at 1008, citing Stemple, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process,* 49 OHIO ST. L.J. 95 (1988).
[185] *Orme School*, 166 Ariz. at 309, 802 P.2d at 1007.

applicable set-back requirements if constructed today. The Commission's record also shows that Wind P1's own witnesses acknowledged the presence of objectionable odors.[186] Finally, the record before the Commission contains over 500 customer complaints about odors.[187]

Wind P1, by contrast, refers to "evidence" that is either not evidence at all or is completely lacking in any probative value. Under these circumstances, the Commission is entitled to summary judgment, even under the *de novo* standard proposed by Wind P1.

C. *This Court Should Disregard Wind P1's Citations To The Owens Affidavit*

Wind P1's "facts" each depend, for the most part, on the inadmissible Owens affidavit. Wind P1's citations to this inadmissible material do not create disputed issues of fact. A motion for summary judgment must demonstrate *by admissible evidence* that a party has met its burden of proof and that it is entitled to judgment as a matter of law. *See Wells Fargo Bank, N.A. v. Allen,* 231 Ariz. 209, 213, ¶17, 292 P.3d 195,199 (App.2012). Wind P1's citations to the Owens affidavit do not meet this standard.

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[186] I.R. 118, C.R. B-9 at 63:13-16 **(App. 246)**, 66:5-11 **(App. 247)**, 83:16-18 **(App. 248)**, 95-96 **(App. 250-51)**; I.R. 114, C.R. A-296 at 44 **(App. 162)**(Decision 73885).

[187] I.R. 114, C.R. A-296 at 19, *see also* fn 9 **(App. 137)**.

The affidavit instead highlights the paucity of the material that Wind P1 presented, both before the Commission and in the Superior Court. The Owens affidavit is replete with statements about what Mr. Owens did not do, could not conclude, or did not determine. Even if the affidavit were admissible, these kinds of assertions do not establish a dispute of material fact. *See Modular Mining Systems, Inc. v. Jigsaw Technologies, Inc.,* 221 Ariz. 515, 520, ¶15, 212 P.3d 853, 858 (App. 2009) (noting that statements indicating a need for additional research or further discovery do not demonstrate the existence of a dispute of fact precluding summary judgment).

D. *Wind P1 Cannot Meet The "Clear And Convincing" Standard Set Forth In A.R.S. § 40-254(E).*

Wind P1 cannot present the quantum of evidence necessary to defeat the Commission's motion for summary judgment. Such a showing is not possible on this record, because the quantum of evidence supporting the Commission's decision is too great, and Wind P1's evidence, by contrast, is too paltry. In other words, even under Wind P1's *de novo* standard, it cannot produce facts of sufficient probative value—under a clear and convincing standard—to allow the trier of fact to find for Wind P1.

Wind P1 repeatedly relies on the *absence* of evidence as the source for its alleged disputes of fact. These assertions, however, fail to meet Wind P1's burden, which is to *produce evidence* demonstrating a genuine issue of fact. *See id.* This

principle is illustrated in *Borders Online LLC v. State Bd. Of Equalization.*[188] In that case, the plaintiff had argued that there was no evidence regarding several issues of material fact. The court, however, found that a party "cannot simply point to an absence of evidence to avoid summary judgment; rather, once a defendant has made a *prima facie* showing, the plaintiff must then set forth the specific facts showing that a triable issue of material fact exists."[189]

Wind P1 also engages in a series of sheer speculations, which it attempts to characterize as "reasonable inferences." These musings, however, are not really connected to the record in any reasonable way. For example, Wind P1 speculates that the residents' complaints may have stemmed from the WWTP's "poor reputation," their concerns about their property values, or "animosity arising from . . . [the WWTP's] checkered past."[190] There is no specific citation to the record to support these possibilities. They are the type of mere speculation or doubt that will not suffice to preclude summary judgment. *See Boomer v. Frank,* 196 Ariz. 55, 58, ¶8, 993 P.2d 456, 459 (App.1999); *Allyn,* 167 Ariz. at 195, 805 P.2d at 1016.

When one examines the respective statements of fact filed in the Superior Court (by the Commission, Wind P1, and the other parties), it becomes apparent that Wind P1 is, in reality, arguing that the evidence before the Commission was

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[188] *Borders Online LLC v. State Bd. Of Equalization,* 29 Cal. Rptr. 3d 176, 129 Cal. App.4th 1179 (2005).
[189] *Id.*
[190] Wind P1's Op. Br. at 44, 47-48.

not sufficient, not that the Commission's Superior Court presentation of that evidence is somehow inaccurate or in dispute. The issue of whether Wind P1 can show, by clear and convincing evidence, that the Commission's decision is unreasonable is more appropriately evaluated as a question of law under the principles of *Grand Canyon Trust.* However, if this Court were to conclude that the Superior Court should have used a *de novo* standard, the Superior Court's judgment should nonetheless be affirmed.

VII. THE SUPERIOR COURT CORRECTLY FOUND THAT THE COMMISSION'S ORDER DOES NOT VIOLATE THE CONTRACT CLAUSES OF THE FEDERAL AND STATE CONSTITUTIONS.

Wind P1 argues that the Superior Court erred in finding that there was no unconstitutional impairment of its Effluent Agreement with BMSC.[191] The Court should reject Wind P1's arguments, which are contrary to established precedent. Although, the Contract Clause "prohibits states from passing laws impairing the obligation of contracts,"[192] it is not absolute, and is subject to the inherent police power of the State to safeguard vital public interests.[193]

The Superior Court applied the following three-part test typically applied by

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[191] Wind P1 Op. Br. at 49-51.
[192] U.S. Const. art. I; Ariz. Const. art. II, § 25.
[193] *Energy Reserves Group, Inc. v. Kansas Power & Light Co.,* 459 U.S. 400, 410, 103 S.Ct. 697, 703 (1983)("*Energy Reserves Group*") , (*citing Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 434, 54 S.Ct. 231, 238, 78 L.Ed. 413 (1934); *Phelps Dodge Corporation v. Arizona Corp. Comm'n,* 207 Ariz. at 119, ¶101, 83 P.3d at 597.

courts to determine whether a regulation unconstitutionally impairs a contract:

> 1) Has the law operated to substantially impair a contractual relationship?
>
> 2) If so, is there a significant and legitimate public purpose underlying the law?[194]
>
> 3) Once a legitimate public purpose is identified, is the adjustment of the rights and responsibilities of the contracting parties based upon reasonable conditions and of a character appropriate to the public purpose underlying adoption of the law?[195]

The Superior Court correctly found that the Commission's order does not substantially impair Wind P1's Effluent Agreement with BMSC. In finding that there was no substantial impairment, the Superior Court correctly relied upon an express provision in the parties' contract providing for termination in the event of regulatory action that prevents operation of the plant:

> The obligations of [Black Mountain] ... shall terminate if physical conditions at the [Plant] or any laws, regulations, orders or other regulatory requirements prevent or materially limit the operation of the [Plant] or render the operation of such plant uneconomic.[196]

The Superior Court found that, under this provision in the Effluent Agreement, the parties clearly "contemplated that the Plant could be closed, the Resort's professed surprise by the 'unprecedented' closure order

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[194] *Energy Reserves Group,* 459 U.S. at 411-412, 103 S.Ct. at 704(*citing to Allied Structural Steel Co. v. Spannaus.*, 438 U.S. 234, 247- 249, 98 S.Ct. 2716, 2723-2725)("such as remedying of a broad and general social and economic problem").
[195] *See Energy Reserves Group*, 459 U.S at 411-12, 103 S.Ct. at 704; *See also Phelps Dodge Corp.*, 207 Ariz. 95, 83 P.3d 573.
[196] I.R. 125, C.R. C-44, attach. A at 5 ¶ 6 **(App. 201)**(Effluent Agreement).

notwithstanding."[197] State regulation that restricts a party to gains it reasonably expected from the contract does not constitute substantial impairment.[198] In finding no substantial impairment, the Superior Court also found it significant that Wind P1 and BMSC are operating in a heavily regulated industry, another factor that courts consider in assessing impairment.[199]

Wind P1 argues that the Superior Court misapplied the *Energy Reserves* precedent.[200] Wind P1 argues that the Superior Court relied on the fact that the parties operate in a heavily regulated industry to "legally limit" the parties' reasonable expectations of full contract performance. This argument misconstrues the Superior Court's order. There is nothing in the Superior Court's order to suggest that it viewed this consideration as limiting the parties' expectations of full performance of the agreement. The Superior Court was allowed to consider this factor in determining the degree of impairment, which is exactly what the Superior

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[197] I.R 197 at 6. *See* also *Energy Reserves Group*, 459 U.S. 400, 416, 103 S.Ct. 697, 707. ("Moreover, the contracts expressly recognize the existence of extensive regulation by providing that any contractual terms are subject to relevant present and future state and federal law. This latter provision could be interpreted to incorporate all future state price regulation, and dispose of the Contract Clause claim.") *See also Baker v. Arizona Department of Revenue*, 209 Ariz. 561, 105 P.3d 1180 (App. 2005), *citing In re Dobert*, 192 Ariz. 248, 253, 963 P.2d 327, 332 (App.1998)("because a party lacked any reasonable expectation that her beneficiary status would continue, her interest in remaining the designated beneficiary was not substantially impaired by a statute's revocation provision").
[198] *See Robson Ranch Quail Creek, LLC v. Pima County*, 215 Ariz. 545, 552, ¶28, 161 P.3d 588, 595 (App.2007).
[199] *Energy Reserves Group*, 459 U.S. at 411, 103 S.Ct. at 704.
[200] *Id.*

Court did.[201]

Wind P1 correctly points out that the Commission's order is case-specific and is limited to the WWTP. This factor actually provides further support for the Superior Court's rejection of Wind P1's claim. The Contract Clause has been held to apply only to legislative action, not to administrative acts. *See Jamaica Ash & Rubbish Removal Co. v. Ferguson,* 85 F.Supp.2d 174, 183 (E.D.N.Y.2000). Legislation has been defined as the power to make laws or rules. *See id.* The Commission's order in this case is not a rulemaking order, and is therefore more adjudicatory in nature. It "bears none of the hallmarks of a legislative act"; it is, instead, the "application of the law, not the creation of a law." *See id; see also Barrows v. Jackson,* 346 U.S. 249, 260, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953). As the mere vehicle for the application of existing law, the Commission's order does not create new regulations, and therefore cannot be said to create legislation that impairs a contract. Under these circumstances, the Superior Court correctly determined that there is no contract impairment.

Wind P1 next suggests that there are disputes of material fact that preclude summary judgment, arguing that it has established the impairment of its "reasonable expectations" under the Effluent Agreement. Specifically, Wind P1 claims that it did not expect the Commission to regulate the WWTP in this manner,

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[201] *Energy Reserves Group*, 459 U.S. at 411, 103 S.Ct. at 704.

because it has not done so in the past and because the applicable statutes and regulations provide "no advance warning" that the WWTP is subject to such oversight.[202] By this argument, Wind P1 essentially claims that it expected the WWTP to be immune from government regulation. Such an expectation is simply not reasonable. The language of the Effluent Agreement clearly and unambiguously provides that BMSC's obligation to continue to operate the WWTP is subject to regulatory requirements, such as a requirement to discontinue operation. And as a matter of law, the Commission clearly has the authority to oversee the facilities of public service corporations and to remediate problems with those facilities.[203]

Even if Wind P1 were correct that the court should have found impairment, the end result is still the same under the remaining two prongs of the Contract Clause analysis. The Commission identified a significant and legitimate purpose to justify its order, as required under prong two: protecting residents from objectionable sewer odors which were of a long-standing and ongoing nature. The Commission's order was also reasonable and appropriate in light of its underlying public purpose, as required under the third prong of the test. As the Commission stated in its order,

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[202] Wind P1's Op. Br. at 54.
[203] *See supra*, Argument II.

> [o]ur actions over the years to address ongoing odor complaints were taken in a manner that reflects the least amount of governmental intrusion possible on the Company's operations, while at the same time attempting to provide for the convenience, comfort and safety of the Company's customers by protecting them from noises and noxious odors that have pervaded the community for years.[204]

Courts defer to legislative judgment about the necessity and reasonableness of social and economic regulations.[205]

Finally, Wind P1 argues that the Commission was merely trying to provide a benefit to BMSC at Wind P1's expense.[206] Under prong two of the standard, which the Court was not required to consider in this case, [t]he critical inquiry is whether the "State is exercising its police power, rather than providing a benefit to special interests."[207] Decision No. 73885 clearly demonstrates the Commission's intent to resolve the offensive odor problems experienced by residents for many years, and was therefore a reasonable exercise of the State's police power. The Superior Court correctly granted the Commission's Motion for Summary Judgment on the Contract Clause claim, and this Court should affirm that determination.

VIII. THE RESORT SHOULD NOT BE AWARDED ATTORNEY'S FEES.

The Resort requests an award of attorney's fees pursuant to A.R.S. §§ 12-

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[204] I.R. 114, C.R. A-296 at 46 **(App. 164)**(Decision 73885).
[205] *Energy Reserves Group*, 459 U.S. 400, 412-13, 103 S.Ct. 697, 705.
[206] Wind P1 Op. Br. at 53.
[207] *Liberty Mutual Insurance Company*, 868 F.Supp. 425, 433 (R.I. 1994)(*citing Energy Reserves Group*, 459 U.S. at 412, 103 S.Ct. at 705 ("The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests.")

341, -342, -348(A) and "other applicable law."[208] The Resort should not be granted attorney's fees and costs because it cannot be the prevailing party. Even if it were to prevail, however, it would not be entitled to attorney's fees.

A. *A.R.S. § 12-348(A)(2) Precludes An Award Of Attorney's Fees For Cases Related To Rates*

A.R.S. § 12-348(A)(2) precludes a fee award for any "action arising from a proceeding . . . in which the role of this state . . . was . . . to establish or fix a rate." Decision No. 73885 was a rate case. As a result, the Resort is not entitled to recovery of fees and expenses pursuant to this statute.[209]

B. *A.R.S. § 12-348(A)(2) Precludes An Award Of Attorney's Fees For Cases Decided Under A de novo Standard Of Review*

The attorney's fees statute, A.R.S. § 12-348(A)(2), does not apply to proceedings in which the Superior Court reviews agency action under a *de novo* standard of review.[210] If the Resort were to prevail in this matter, and if the Court were to adopt a *de novo* standard of review, the Resort would not be entitled to an award of attorney's fees.

C. *Attorney's Fees Are Not Available Under A.R.S. § 12-328(A)(2) Unless Wind P1 Prevails On The Merits*

If this Court were to conclude that Wind P1 is entitled to a trial in Superior

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[208] Wind P1's Op. Br. at 55.
[209] *See Phelps Dodge Corp..*, 207 Ariz. at 127, 83 P.3d at 605.
[210] *See Cyprus Bagdad Copper Corp. v. Ariz. Dept. of Revenue,* 188 Ariz. 345, 349, 933 P.2d 923, 927 (App.1997).

Court, the ruling would be procedural in nature, rather than an adjudication on the merits. Procedural matters do not trigger an award of attorney's fees under A.R.S. § 40-328(A)(2). *See Columbia Parcar Corp. v. Arizona Dept. of Transp.,* 193 Ariz. 181, 183, ¶13, 971 P.2d 1042, 1044 (1999). "A judgment on the merits is one which is based on legal rights as distinguished from mere matters of practice, procedure, jurisdiction, or form." *Id.* at 184, 971 P.2d at 1045.

D. *Attorney's Fees Are Not Available In This Matter Because The Commission Was Adjudicating A Complaint Between Private Parties*

Just as a trial judge is not assessed attorney's fees if one of his decisions is overturned, the Commission should not be assessed attorney's fees when its involvement in a case is merely to resolve a matter filed before the Commission in its capacity as a forum.[211] For all of these reasons, Wind P1 is not entitled to attorney's fees, even if it were to prevail in this appeal.

CONCLUSION

For the foregoing reasons, this Court should affirm the Superior Court's judgment.

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[211] *See Cortaro Water Users' Ass'n v. Steiner,* 148 Ariz. 314, 318, 714 P.2d 807, 811 (1986).

RESPECTFULLY SUBMITTED this 6th day of February, 2015.

By /s/ Robin R. Mitchell

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ARIZONA COURT OF APPEALS

DIVISION ONE

WIND P1 MORTGAGE BORROWER L.L.C., a Delaware limited liability company, Plaintiff/Appellant, v. ARIZONA CORPORATION COMMISSION, an agency of the State of Arizona; BLACK MOUNTAIN SEWER CORPORATION, an Arizona Corporation; TOWN OF CAREFREE, an Arizona municipal corporation, Defendants/Appellees. THE BOULDERS HOMEOWNERS ASSOCIATION, an Arizona non-profit corporation; Intervenor/Appellee.	Court of Appeals Division One No. 1CA-CV 14-0643 Maricopa County Superior Court No. CV2013-007804

INTERVENOR/APPELLEE BOULDERS HOMEOWNERS ASSOCIATION'S ANSWERING BRIEF

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INTRODUCTION

Pursuant to Rule 13(h) of the Arizona Rules of Civil Appellate Procedure, Intervenor/Appellee The Boulders Homeowners Association, an Arizona non-profit corporation ("BHOA") does join in the Answering Brief of Defendant/Appellee Arizona Corporation Commission, as if fully set forth herein. In addition, regarding the Commission's argument that it has constitutionally-based authority to adopt Decision No. 73885 (Commission's Answering Brief Section I.D), BHOA offers the following additional argument.

ARGUMENT

As noted by the Commission, Ariz. Constitution Article XV, Section 3 includes two separate authorizations:

> The corporation commission ***shall*** **have full power to,** and shall, prescribe just and reasonable classifications to be used and just and reasonable rates and charges to be made and collected, by public service corporations within the state for services rendered therein, and **make reasonable rules, regulations and orders**, by which such corporations shall be governed in the transaction of business within the state, ***and may*** prescribe the forms of contracts and the systems of keeping accounts to be used by such corporations in transacting such business, and **make** and enforce reasonable **rules, regulations and orders for the convenience, comfort, and safety**, and the preservation of the health of, the employees and patrons of such corporations; .... (emphasis added).

The two authorizations grant two types of powers: mandatory powers ("shall....") and discretionary powers ("may..."). *See, Ariz. Eastern R. Co. v. State*, 19 Ariz. 409, 413, 171 P. 906, 908 (1918). The authority to make rules, regulations and

orders is mentioned twice, as both a mandatory and a discretionary power. The mandatory authority described in the first part of Section 3 is often described as the Commission's rate making authority. *See, Ariz. Corp. Comm'n v. State ex rel. Woods*, 171 Ariz. 286, 294, 830 P.2d 807, 815 (1992). It is this rate making authority that is the exclusive prerogative of the Commission, and the courts have been careful to protect the Commission's authority over rate making from infringements by other branches. *State v. Tucson Gas Electric Light & Power Co.*, 5 Ariz. 294, 299-301 (1914); *Ethington v. Wright*, 66 Ariz. 382, 189 P.2d 209 (1948); *State ex rel. Corbin v. Ariz. Corp. Comm'n*, 174 Ariz. 216, 848 P.2d 301 (App. 1992). Most of the cases that discuss the Commission's authority concern the Commission's exclusive rate making authority.

The Commission's discretionary, but nonetheless constitutionally-based, authority has received much less attention from the courts. In *Ariz. Eastern R. Co.*, the Arizona Supreme Court held that Article XV, Section 3's grant to the Commission of authority to make rules for the comfort, convenience and safety of patrons is not exclusive, but that such power may also be exercised by the Legislature. 19 Ariz. 409, 415-16, 171 P. 906, 909 (1918). In *Pacific Gas & Electric Co. v. State*, the Supreme Court held that even though the Legislature and the Commission may both have authority to act as to matters affecting comfort,

convenience and safety, the Commission's action would trump any conflicting legislative enactment. 23 Ariz. 81, 201 P. 623 (1921).

Decision No. 73885 advances the public's convenience and comfort, and is therefore within the scope of Commission's authority under the second portion of Article XV, Section 3. Further, if there is a conflict between requirements established by legislative authority (e.g., Arizona Department of Environmental Quality ("ADEQ") exercising delegated legislative authority) and the Commission-established requirement of Decision No. 73885, the Commission's requirement would prevail over that of ADEQ.

CONCLUSION

For the foregoing reasons, this Court should affirm the Superior Court's judgment.

RESPECTFULLY submitted this 6th day of February, 2015.

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443939

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Certificate of Compliance: Certificate of Compliance for Intervenor/Appellee Boulders Homeowners Association's Answering Brief
Certificate of Service: Certificate of Service for Intervenor/Appellee Boulders Homeowners Association's Answering Brief

ARIZONA COURT OF APPEALS

DIVISION ONE

WIND P1 MORTGAGE BORROWER L.L.C., a Delaware limited liability company, Plaintiff/Appellant, v. ARIZONA CORPORATION COMMISSION, an agency of the State of Arizona; BLACK MOUNTAIN SEWER CORPORATION, an Arizona Corporation; TOWN OF CAREFREE, an Arizona municipal corporation, Defendants/Appellees. THE BOULDERS HOMEOWNERS ASSOCIATION, an Arizona non-profit corporation; Intervenor/Appellee.	Court of Appeals Division One No. 1CA-CV 14-0643 Maricopa County Superior Court No. CV2013-007804

CERTIFICATE OF COMPLIANCE FOR INTERVENOR/APPELLEE BOULDERS HOMEOWNERS ASSOCIATION'S ANSWERING BRIEF

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[√]A brief, and is submitted under Rule 14(a)(5)

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[] A petition or cross-petition for review, a response to a petition or cross-petition, or a combined response and cross-petition, and is submitted under Rule 23(h)

[] An amicus curiae brief, and is submitted under Rule 16(b)(4)

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COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

WIND P1 MORTGAGE BORROWER, L.L.C., a Delaware limited liability company, Plaintiff/Appellant, v. ARIZONA CORPORATION COMMISSION, an agency of the State of Arizona; BLACK MOUNTAIN SEWER CORPORATION, an Arizona corporation; TOWN OF CAREFREE, an Arizona municipal corporation, Defendants/Appellees. THE BOULDERS HOMEOWNERS ASSOCIATION, an Arizona non-profit corporation, Intervenor/Appellee.	Court of Appeals No. 1 CA-CV 14-0643 Maricopa County Superior Court No. CV2013-007804

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PURSUANT TO RULE 13, ARIZ. R. CIV. APP. P.

Pursuant to Rule 13 and Rule 13.1, Ariz. R. Civ. App. P., the Table of Contents to this Answering Brief is bookmarked at the referenced page. Additionally, this brief has been formatted with bookmarks to items in the Appendix to Answering Brief ("APP") where the items are cited. The Appendix Table of Contents is also bookmarked at the referenced appendix page number.

INTRODUCTION

The Boulders East wastewater treatment plant ("WWTP" or "Plant") has been in the same location in Carefree, Arizona since the 1960s. Wind P1 Mortgage Borrower L.L.C.'s ("Resort") predecessors-in-interest built the Plant and two golf courses near the Plant and then developed the residential community around them. The Plant is now adjacent to one of the golf courses and less than 100 feet from three homes, less than 300 feet from ten homes, and within 1000 feet of 200-300 homes. The Resort's predecessors-in-interest built the Plant and golf courses, and then developed the residential community around them.

Liberty Utilities (Black Mountain Sewer) Corp. ("Liberty (BMSC)") has owned and operated the Plant for nearly 15 years.[1] Liberty (BMSC) is an Arizona public service corporation that provides wastewater utility service to approximately 2100 customers in Carefree and portions of Scottsdale, Arizona. As a public service corporation, Liberty (BMSC) is regulated by the Arizona Corporation Commission ("Commission").

The WWTP treats 120,000 gallons per day (gpd) of wastewater flows from residences and businesses in Liberty (BMSC)'s certificated service territory. Additional wastewater from its customers is collected and delivered by Liberty

[1] Black Mountain Sewer Corporation formally changed its name to Liberty Utilities (Black Mountain Sewer) Corp. in June 2013.

(BMSC) to the City of Scottsdale for treatment. Wastewater collected and delivered to the WWTP is treated and reclaimed as "A" quality effluent and then delivered to the Resort for use in irrigating its golf courses pursuant to an agreement between the Resort and Liberty (BMSC). It is undisputed that Liberty (BMSC) has operated the Plant in full compliance with all applicable laws and regulations governing the operation of a water reclamation facility.

Liberty (BMSC) has made significant capital improvements to the sewer collection system in and around the Boulders community. Following a Commission rate order in 2006, Liberty (BMSC) eliminated a lift station, a facility used to force wastewater uphill and a known source of sewer odors. Liberty (BMSC) also implemented other upgrades to minimize odors produced from the sewer collection system. Liberty (BMSC) also made substantial improvements to the WWTP to minimize release of sewer odors and noise from the Plant's operation. Significant capital improvements to the Plant included purchase and installation of an odor scrubber, and heavy rubber matting over grates to seal off areas of the Plant where treatment takes place.

While such improvements substantially reduced odors from the Plant, one thing has not changed – the WWTP is located in the middle of the Boulders community, on the golf course and near homes. The issue in this case has always been about location and Liberty (BMSC)'s continued compliance with all legal and

industry standards will not change the Plant's location, a location that the Commission twice has concluded is no longer consistent with the public interest.

In the proceedings before the Commission, the Resort was given every opportunity to present its case and the Commission determined that the public interest is best served by closure of the Plant. At hearing, the Resort presented evidence and witnesses, and challenged the evidence presented by the other parties. After the hearing, the Resort filed closing briefs, arguing its case to the Administrative Law Judge ("ALJ") before he made a Plant closure recommendation to the Commission, and the Resort then presented its case before the full Commission at open meeting.

The Commission issued its Phase 2 Decision on May 8, 2013,[2] concluding, "due to its location, the Boulders WWTP can no longer be operated in a manner

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[2] "Phase 2 Decision" refers to *In the Matter of Black Mountain Sewer Corp., an Ariz. Corp., for a Determination of the Fair Value of Its Utility Plant and Prop. and for Increases in its Rates and Charges for Utility Servs. Based Thereon*, Docket No. SW-02361A-08-0609, Decision No. 73885, Phase 2 Opinion and Order, 2013 WL 2420850 (Ariz. Corp. Comm'n May 8, 2013). The Phase 2 Decision is included in the Appendix to Answering Brief (APP004-055). "Phase 1 Decision" refers to *In the Matter of the Application of Black Mountain Sewer Corp., an Ariz. Corp., for a Determination of the Fair Value of Its Utility Plant and Prop. and for Increases in its Rates and Charges for Utility Servs. Based Thereon*, Docket No. SW-02361A-08-0609, Decision No. 71865, Phase 1 Opinion and Order, 2013 WL 2420850 (Ariz. Corp. Comm'n Sept. 1, 2010). The Phase 1 Decision is included in the Appendix to Answering Brief (APP058-127).

consistent with the public interest." EIR 141, Ex. 3 at 50:7-8 [APP053].[3] Accordingly, the Commission ordered Liberty (BMSC) to close the Plant. *Id.* [APP053]. The Resort then appealed to Superior Court, arguing that the Commission did not have the authority to order Liberty (BMSC) to close the Plant. The Superior Court disagreed. After another round of briefing and argument, the Superior Court granted summary judgment against the Resort finding that it had failed to meet its burden to show by clear and convincing evidence that the Phase 2 Decision was unlawful, unreasonable, or otherwise unsupported by substantial evidence.[4]

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[3] "EIR" means the Clerk's Electronic Index of Record for Maricopa County Superior Court Case No. CV2013-007804, dated Oct. 14, 2014.

[4] The Resort has also sought and been denied relief by the Arizona Supreme Court with respect to the Commission's order. *Wind P1 Mortgage Borrower v. Gary Pierce, et al.*, No. CV-13-0236-SA (Ariz. Aug. 27, 2013) (order declining to accept special action jurisdiction).

ISSUES PRESENTED

Did the trial court correctly conclude that the Resort failed to meet its burden to show by clear and convincing evidence that the Commission's order that Liberty (BMSC) close the WWTP was unreasonable, unlawful, or unsupported by substantial evidence?

COMBINED STATEMENT OF THE CASE AND FACTS

The Commission has twice determined that Liberty (BMSC), a public service corporation subject to Commission authority, should close the WWTP. EIR 142, Ex. 10 at 64:5-9 [APP123]; EIR 141, Ex. 3 at 50:7-11 [APP053]. The Commission properly reasoned that even though Liberty (BMSC) operates the Plant in compliance with all applicable laws and has taken reasonable steps to address noises and odors emanating from the Plant, the Plant's location compels that it be closed. EIR 141, Ex. 3 at 44 [APP047]; *see also* EIR 141, Ex. 3 at 18:14-15 [APP021] ("complaints regarding odors and noises at the [P]lant are due to its proximity to homes rather than mechanical problems").

Given the repeated and ongoing complaints of residents living near the Plant, the Commission recognized that the consumers serviced by the Plant no longer wanted it located in their community and were willing to pay for its removal. EIR 141, Ex. 3 at 45-46 [APP048-049]. In no uncertain terms, the Commission determined that the public interest and convenience of the customers and the community were best served by closure of the Plant. *See, e.g.,* IR 141, Ex. 3 at 47:13-18 [APP050]. It is this finding by the Commission that the Resort has challenged, and which the Superior Court upheld. EIR 19; EIR 197; EIR 204.

I. The Administrative Record Before the Superior Court.

The Commission concluded its resolution of the issues in the Phase 2 Decision with the following declaration: "Our order in this proceeding to move forward with closure of the treatment plant is hopefully the final step in this lengthy process and will provide relief for customers in the Boulders community." EIR 141, Ex. 3 at 46:12-14 [APP049]. A review of the "lengthy process" that precedes this appeal explains the Commission's statement.

A. Commission Docket No. SW-02361A-08-0609 – Phase 1.

Liberty (BMSC) is an Arizona public service corporation providing sewage treatment service to approximately 2,100 primarily residential customers in and around Carefree, Arizona, under a certificate of convenience and necessity issued by the Commission. ERI 142, Ex. 10 at 2:3-6 [APP061]. Liberty (BMSC) owns and operates a single wastewater treatment facility, the Plant, formally known as the Boulders East Wastewater Treatment Facility. *See* EIR 141, Ex. 3 at 48:7-8 [APP051].

The Plant was built more than 40 years ago and is located in the middle of the Boulders community on one of the Resort's golf courses. EIR 141, Ex. 3 at 5:25-26, 48:7-8 [APP008, APP051]. It is situated less than 100 feet from three homes and within 1,000 feet of approximately 300 homes. EIR 141, Ex. 3 at 48:12-13 [APP051]. The Plant treats up to 120,000 gallons of wastewater each day, which

represents roughly 20 percent of Liberty (BMSC)'s treatment capacity. EIR 141, Ex. 3 at 48:9-10 [APP051]. The remainder of that daily sewer flow is delivered to the City of Scottsdale for treatment. EIR 141, Ex. 3 at 48:10-11 [APP051]. The reclaimed water, also known as effluent, is delivered to the Resort under an Effluent Delivery Agreement between the Resort and Liberty (BMSC). EIR 142, Ex. 5 [APP131-143].

On December 19, 2008, Liberty (BMSC) filed a rate case application requesting that the Commission establish new rates for its services. EIR 142, Ex. 10 at 61:10-11 [APP120]. The Boulders Homeowners Association ("BHOA") intervened in that rate case in April 2009 (EIR 142, Ex. 10 at 2:14-15 [APP061]), in an effort to address odor issues relating to operation of the Plant and potential closure of the Plant. Thereafter, Liberty (BMSC) and BHOA entered into settlement negotiations and, on September 17, 2009, reached an agreement concerning closure of the Plant (the "Closure Agreement"). EIR 142, Ex. 10 at 42:8-43:6 [APP101-102]; EIR 143, Ex. 12.

Among other things, the Closure Agreement conditioned the Plant closure on: (1) an amendment to Liberty (BMSC)'s treatment agreement with the City of Scottsdale, (2) termination of Liberty (BMSC)'s obligation to deliver effluent from the Plant to the Resort under the parties' effluent delivery contract, and (3) approval of a rate surcharge by the Commission to address Liberty (BMSC)'s closure costs.

See EIR 141, Ex. 3 at 11:14–12:1 [APP014-015]. The Closure Agreement was submitted to the Commission in Liberty (BMSC)'s rate case. *See* EIR 142, Ex. 10 at 42:8-43:6 [APP101-102].

The Commission found that the Closure Agreement represented a "reasonable resolution of the current odor concerns expressed by hundreds of [Liberty (BMSC)] customers." EIR 142, Ex. 10 at 49:17-18 [APP108]. To facilitate Liberty (BMSC)'s funding and recovery of costs associated with closure of the Plant, the Commission approved a special rate design mechanism. As the Commission explained:

> We believe that allowance of a reasonable surcharge to permit [Liberty (BMSC)] to collect legitimate capital costs, for the narrow and explicit purpose of affording relief from noxious odors, is within the Commission's constitutional and statutory authority and is consistent with our obligation to balance the interests of public service corporations and their customers. We do not believe that being responsive to the concerns expressed by customers in this case will open the floodgates to a spate of adjustment mechanism applications, given the unique characteristics of this case. There is no other instance recounted in the record in which customers of a company have so overwhelmingly supported a solution to a quality of life issue, as well as a willingness to pay a reasonable charge to bring that solution to fruition.

EIR 142, Ex. 10 at 53:7-15 [APP112].

Following the Phase 1 Decision, representatives from Liberty (BMSC), BHOA and the Town of Carefree met with representatives of the Resort to discuss closure of the Plant. EIR 141, Ex. 3 at 24:20-22 [APP027]. Plant closure would mean that the effluent from the Plant would no longer be available to the Resort,

and alternatives to the effluent supplied by Liberty (BMSC) to the Resort were considered over the next year. EIR 141, Ex. 3 at 24:22–25:7 [APP027-028]. No resolution was ever reached.

B. Commission Docket No. SW-02361A-08-0609 – Phase 2.

Tired of waiting for Liberty (BMSC) and the Resort to agree upon termination of effluent deliveries from the Plant, BHOA sought relief from the Commission on June 15, 2011. EIR 141, Ex. 3 at 47:6-9 [APP050]. Specifically, BHOA requested that the Commission reopen the rate case decision to order closure of the Plant. *See id.* [APP050]. On January 24, 2012, the Commission reopened Liberty (BMSC)'s rate case to consider the additional question of whether to order Liberty (BMSC) to close the Plant. EIR 141, Ex. 3 at 47:20-22 [APP050].

The Resort intervened in the second phase of the rate case (EIR 141, Ex. 3 at 47:10-12 [APP050]), and an evidentiary hearing was held before the same ALJ who had presided over the first phase. EIR 141, Ex. 3 at 1:13, 47:27-28 [APP004, APP050]. All parties were provided the opportunity to conduct discovery, pre-file testimony, cross-examine witnesses, and present other evidence at the hearing. *See* EIR 141, Ex. 3 at 3:22–4:4 [APP006-007]. The parties to the Phase 2 proceedings agreed that Liberty (BMSC) had operated the Plant in compliance with all applicable laws and regulations, and had made substantial improvements to decrease odors and noise from the Plant. EIR 141, Ex. 3 at 44:6-28 [APP047].

After trial, and prior to open meeting before the Commission, the parties filed closing briefs, citing to the hearing transcripts, exhibits, deposition testimony, and other evidence. *See, e.g.*, EIR 141, Ex. 3 at 3:16-17, 4:3-18, 48:1-4 [APP006, APP007, APP051]. Applying the law and weighing the evidence, including the existing record in the rate case docket, the Commission carefully considered whether to order closure of the Plant. EIR 141, Ex. 3 at 37:20-46:14 [APP040-049].

The Commission relied on, in part, several key facts, which were entered into evidence by stipulation – a stipulation unopposed by the Resort:

- Complaints have been received that odors from the Treatment Plant are noticeable by and objectionable to Boulders residents. Such residents also have complained that odors from the Treatment Plant can be irritating and sometimes interfere with residents' opportunity to leave their windows open to enjoy fresh air in the immediate vicinity of the facility.
- Complaints from residents regarding odors from the Treatment Plant appear more frequent from October through April.
- Since Decision No. 71865 was issued, [Liberty (BMSC)] has received and logged 23 odor complaints (including a lawsuit filed in Maricopa County Superior Court by a resident living adjacent to the Treatment Plant).

- A portion of the north Boulders golf course is adjacent to the Treatment Plant. Golfers playing the north Boulders golf course have also complained at times of noticeable odors as they pass by the Treatment Plant.
- The Treatment Plant is operated in full compliance with all applicable law and industry standards. In addition, Liberty (BMSC) has taken steps to minimize odors and noises from the operation of the facility, including, among other improvements, the installation of an odor-scrubber.
- It is not feasible to completely eliminate odor and noise from the operation of the Treatment Plant.

EIR 141, Ex. 3 at 44:10-28 [APP047].

The Resort did not object to the foregoing evidence. EIR 141, Ex. 3 at 45:1-2 [APP048]. Moreover, the Resort had ample opportunity to submit its own evidence, including expert witness testimony, to rebut the fact that the Plant's location remains an intractable problem, but did not do so. *See* EIR 141, Ex. 3 at 44:3-28 [APP047]. Nor did the Resort produce evidence that other reasonable odor and noise control measures were available.

In addition to the unopposed stipulated facts set forth above, the Commission noted that it had received more than 500 customer comments during the first phase

of Liberty (BMSC)'s rate case. EIR 141, Ex. 3 at 45:3-4 [APP048]. Additionally, between November 2012 and January 2013, the Commission received more than 30 additional public comment letters requesting closure of the Plant. EIR 141, Ex. 3 at 45:6-7 [APP048]. The Town of Carefree also passed a resolution supporting closure of the Plant, which was filed with the Commission, and the Town urged the same during the public comment portion of the Commission's open meeting. *See* EIR 141, Ex. 3 at 19:8-11, 47:15-19 [APP022, APP050].

The Commission reached the well-reasoned conclusion that closure of the Plant served the public interest, determining that "[t]he record supports a finding that due to its location, the Boulders WWTP can no longer be operated in a manner consistent with the public interest[.]" EIR 141, Ex. 3 at 49:16-17 [APP052]. Pursuant to its statutory authority, the Commission ordered Liberty (BMSC) to close the Plant, finding that such closure was "necessary to protect the health and safety of the public, and provide for the comfort and convenience of customers." EIR 141, Ex. 3 at 50:1-5 [APP053]. The Resort's two special actions to the Supreme Court, and its appeal to the Superior Court, followed the Commission's second finding that, after more than 40 years, the location of the plant is no longer consistent with the public interest.

II. The Superior Court's Review.

After the Resort's request for rehearing was denied, it appealed to the Superior Court pursuant to A.R.S. § 40-254. EIR 1. Limited discovery was conducted, and the Resort moved for summary judgment on four of the five counts set forth in its complaint. EIR 139; EIR 144.[5] In its moving papers, the Resort asserted that on the record before the Superior Court, the Resort was entitled to summary judgment on all four counts. *Id.* Nowhere in its pleadings did the Resort assert or otherwise suggest that summary judgment in its favor would fall short of satisfying its right to due process on appeal. Rather, the Resort sought judgment and reversal of the Commission's decision arguing that there was no material issue of disputed fact to preclude a finding of summary judgment in its favor on the four counts of its complaint. *Id.*

The Commission and Liberty (BMSC) both filed responses and cross-motions for summary judgment. EIR 150; EIR 155. Oral argument was held and the Superior Court issued its ruling on June 2, 2014, denying summary judgment to the Resort

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[5] The four counts upon which summary judgment was sought were (1) the decision was unreasonable, unlawful, lacks substantial evidence, (2) the decision violates Commission rules on sufficiency of facilities, (3) contract impairment, and (4) denial of due process. The remaining count was the Resort's request for a preliminary stay of the Phase 2 Decision pending appeal. However, the Superior Court was constitutionally precluded from granting such relief. ARIZ. CONST. art. 15, § 17. Moreover, this count was moot upon issuance of the Superior Court's ruling granting summary judgment against the Resort on its other claims. *See* EIR 197 at 7-8.

and granting summary judgment to the Commission and Liberty (BMSC) on counts 2-5 of the Resort's complaint. EIR 197 at 7. The final judgment was entered on August 20, 2014 and certified on September 23, 2014. EIR 204; EIR 212. This appeal followed. EIR 206.

ARGUMENT

I. Standard of Review.

The Resort correctly states that this Court is reviewing the decision of the Superior Court upholding the Commission's decision, not the decision of the Commission itself. Appellant Wind P1 Mortgage Borrower L.L.C.'s Opening Brief (filed Dec. 1, 2014) ("Resort Br.") at 10. It is important, however, to also consider the standard of review applicable to the Superior Court and its review of the Phase 2 Decision.

A decision of the Commission may not be overturned unless the party challenging that decision shows by clear and convincing evidence that the Commission acted in an unreasonable or unlawful manner. A.R.S. § 40-254 (E); *Grand Canyon Trust v. Ariz. Corp. Comm'n*, 210 Ariz. 30, 33, ¶ 9, 107 P.3d 356, 359 (App. 2005). The Superior Court is not permitted to reweigh evidence or substitute its judgments for those of the Commission. *Tucson Elec. Power Co. v. Ariz. Corp. Comm'n*, 132 Ariz. 240, 243, 645 P.2d 231, 234 (1982). *See also Grand Canyon Trust,* 210 Ariz. at 34, ¶ 11, 107 P.3d at 360. Instead, a decision of the Commission may only be reversed if it is not reasonably supported by the evidence, is arbitrary, or is otherwise unlawful. *Grand Canyon Trust*, 210 Ariz. at 33-34, ¶¶ 10-11, 107 P.3d at 359-360. *See also Tucson Elec. Power*, 132 Ariz. at 243, 645 P.2d at 234. This is true even if the matter under review does not involve

ratemaking. *See* A.R.S. § 40-254(E).[6] In this case, there was substantial evidence for the Superior Court to affirm the Phase 2 Decision, and little, if any, evidence that would support the arguments the Resort asserted on appeal below or in this Court now.

II. The Superior Court Correctly Held that the Commission Has Statutory Authority to Direct a Public Service Corporation to Make Additions, Improvements, or Changes for the Public Convenience.

A. The Commission Has Statutory Authority to Order Closure of the Plant in this Case.

The Commission relied on both its constitutional and its statutory authority in support of its order that Liberty (BMSC) close the Plant. EIR 141, Ex. 3 at 37:19–42:21 [APP040-045]. The Superior Court found at page 3 of the Ruling that the order to close the Plant was not within the Commission's constitutional powers, nor a necessary ratemaking step. EIR 197 at 3. But this Court need not address the scope of the Commission's constitutional authority as applied to the facts of this case. The Commission's statutory authority is adequate.

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[6] Further discussion of the deferential standard of review applicable to the Commission and other administrative agencies can be found in Section III of the Argument, *infra*, at 29-37.

A.R.S. § 40-331(A) provides

> A. When the commission finds that additions or improvements to or changes in the existing plant or physical properties of a public service corporation ought reasonably to be made, or that a new structure or structures should be erected, to promote the security or convenience of its employees or the public, the commission shall make and serve an order directing that such changes be made or such structure be erected in the manner and within the time specified in the order. If the commission orders erection of a new structure, it may also fix the site thereof.

Consistent with this statute, the Commission ordered changes to a public service corporation's existing facilities to promote the public convenience. EIR 141, Ex. 3 at 33:9-11, 36:10 [APP036, APP039].

A.R.S §§ 40-321(A) and 361(B), also relied upon by the Commission, grant similar authority. The first statute provides, in relevant part

> A. When the commission finds that the equipment, appliances, facilities or service of any public service corporation, or the methods of manufacture, distribution, transmission, storage or supply employed by it, are unjust, unreasonable, unsafe, improper, inadequate or insufficient, the commission shall determine what is just, reasonable, safe, proper, adequate or sufficient, and shall enforce its determination by order or regulation.

The second statute provides

> B. Every public service corporation shall furnish and maintain such service, equipment and facilities as will promote the safety, health, comfort and convenience of its patrons, employees and the public, and as will be in all respects adequate, efficient and reasonable.

Again, consistent with these statutes, the Commission found that, due to its location in the middle of the Boulders community, portions of Liberty (BMSC)'s facilities – the Plant – could no longer be operated consistent with the public comfort and convenience. EIR 141, Ex. 3 at 45:21–46:14 [APP048-049]. *See also* EIR 141, Ex. 3 at 32, n. 15 [APP035] citing *Ariz. Water Co. v. Ariz. Corp. Comm'n,* 161 Ariz. 389, 392, 778 P.2d 1285, 1288 (App. 1989) (confirming Commission's authority to order public service corporation to expand its facilities and the utility's obligation to comply). The Phase 2 Decision also included a mechanism to ensure just compensation to Liberty (BMSC) for closure of the Plant.

Nevertheless, the Resort argues that the Superior Court should have found "express" statutory authority for the decision to order closure of a WWTP. Resort Br. at 15. Presumably, the Resort believes that the legislature should have specifically stated in the statutes that the Commission can order a sewer utility to close a sewer plant. As noted in the statutes cited above, the Commission has the explicit power to order Liberty (BMSC) to make changes to its facilities to promote the public convenience. Such changes necessarily include additions or deletions to a utility's plant in service. The Resort has not pointed to any legal authority for the proposition that statutes granting Commission authority must somehow specify the types of facilities regulated utilities operate, the actual problems they may face, and the potential remedies the Commission might order. The Resort seeks to hold

legislative action to an impossible and impractical standard. *See S.E.C. v. Chenery Corp.,* 332 U.S. 194, 202-03 (1947) (an administrative agency needs to deal with problems on a case-by-case basis, and the choice as to how to proceed is one that lies primarily in the informed discretion of the agency).

The Commission regulates over 400 public service corporations providing electric, gas, water and wastewater utility services to millions of Arizona citizens and businesses. Obviously, the Arizona Legislature could not and cannot foresee all of the specific circumstances involving the equipment and facilities of every one of these utility providers, and the adequacy and sufficiency of these utility services, and the comfort and convenience of millions of Arizonans impacted by Commission regulation. An electric utility may face a problem with the location of a transmission line in a developing community, or a water utility may have inadequate facilities to treat the groundwater it pumps. The legislature could only empower the Commission to address these matters as they arose, which it did in the statutes that give the Commission the power to order changes to utility facilities to promote adequate and sufficient service and/or the public comfort and convenience. *See* A.R.S §§ 40-321(A), 331(A) and 361(B). The Resort's interpretation of these statutes is not reasonable, let alone real world practical, and certainly does not support reversal of the Superior Court decision below.

B. The Commission Was Not Regulating Nuisances, and It Did Not Invade the Province of Other Agencies of the State.

The Resort has consistently sought to portray the Commission as acting to address a nuisance, which would be outside its powers. Resort Br. at 18-20. As the Commission noted regarding common law nuisance

> It is a class of wrongs which arises from an unreasonable, unwarranted, or unlawful use by a person of his own property, working an obstruction or injury to the right of another, or to the public, and producing such material annoyance, inconvenience, and discomfort that the law will presume a resulting damage.

EIR 141, Ex. 3 at 35 [APP038] quoting *City of Phoenix v. Johnson,* 51 Ariz. 115, 123, 75 P.2d 30, 34 (1938). Nuisance was not before the Commission, and no tribunal has ever found the Plant to constitute a nuisance. Here, plain and simple, the Commission determined that continued operation of the Plant was no longer in the interest of Liberty (BMSC) customers or in the public interest.

Moreover, the common law of nuisance does not supersede the constitutional or statutory powers of the Commission to act to promote the public health, safety, peace, comfort or convenience. EIR 141, Ex. 3 at 43-44 [APP046-047]. Exercising those powers, the Commission directed Liberty (BMSC) to make the capital improvements necessary to stop treating wastewater at a specific location.

The Commission's order also did not stray into the exclusive regulation of the Arizona Department of Environmental Quality, or the Arizona Department of Water Resources, or Maricopa County Environmental Services department, or the United

States Environmental Protection Agency, or any other agency with applicable jurisdiction. Resort Br. at 20-25. Operation of the WWTP met every applicable law, rule and industry standard for such things as odors and noises. EIR 141, Ex. 3 at 44 [APP047]; *see also* EIR 141, Ex. 3 at 18:14-15 [APP021].

It stands to reason that lawful operation of a sewer plant may not necessarily serve the public interest at a specific location. So, the Legislature gave the Commission the power to determine, among other things, that the mere existence of a facility in the midst of the Boulders community, on the golf course and less than a hundred feet from some homes and less than a 1,000 feet from a lot of homes, no longer promotes the public convenience. *See* A.R.S. §§ 40-321(A), 331(A) and 361(B). The Commission exercised those powers in determining that continued operation of the Plant at issue here was not in the public interest and the Superior Court rightfully upheld that decision.

III. The Superior Court Applied the Correct Standard of Review to the Phase 2 Decision.

The Resort devotes approximately 40 percent of its opening brief arguing for an essentially unqualified right to retry the Commission's Phase 2 Decision in the Superior Court. Resort Br. at 26-49. What the Resort suggests, however, is a standard of review under which all non-ratemaking decisions by the Commission would be retried in the Superior Court. That is not the law.

A. The Resort Failed to Show by Clear and Convincing Evidence that the Decision was Unlawful, Unreasonable, or Unsupported by Evidence.

The Resort's appeal was brought under A.R.S. § 40-254. The statute states in part (E)

> In all trials, actions and proceedings the burden of proof shall be upon the party adverse to the commission or seeking to vacate or set aside any determination or order of the commission to show by clear and satisfactory evidence that it is unreasonable or unlawful.[7]

As the *Grand Canyon Trust* Court explained, because the plaintiff's burden of proof is to establish "in all proceedings" that the Commission's order is either unlawful or unreasonable, the superior court must evaluate the determinations already made by the Commission. 210 Ariz. at 33, ¶ 10, 107 P.3d at 359. The Court further explained that:

> "[B]oth the superior court and this court may depart from the Commission's legal conclusions or interpretation of a statute and determine independently whether the Commission erred in its interpretation of the law." *Babe Invs. v. Arizona Corp. Comm'n,* 189 Ariz. 147, 150, 939 P.2d 425, 428 (App. 1997) (citation omitted). However, when the plaintiff challenges a factual determination of the Commission, the superior court is not free to overturn it unless the plaintiff demonstrates by "clear and convincing" evidence that the Commission's determination is unreasonable. In making this

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[7] " 'Clear and satisfactory' [evidence] is the same as 'clear and convincing' [evidence]." This is a higher burden of proof than the "preponderance of the evidence" standard which plaintiffs must meet in most civil cases." *Grand Canyon Trust,* 210 Ariz. at 33, ¶ 10, n. 5, 107 P.3d at 359 quoting *Tucson Elec. Power*, 132 Ariz. at 243, 645 P.2d at 234.

> assessment Arizona courts uphold such determinations if they are supported by **substantial evidence**. *Tucson Elec. Power,* 132 Ariz. at 243–44, 645 P.2d at 234–35 (court may disturb Commission's finding of fact only if it is not reasonably supported by evidence, is arbitrary or is otherwise unlawful); *Arizona Corp. Comm'n v. Citizens Util. Co.,* 120 Ariz. 184, 187, 584 P.2d 1175, 1178 (App. 1978) (same). Such a review is very different from assuming that all facts alleged by the Trust are true. *Havasu Heights Ranch & Dev. Corp. v. Desert Valley Wood Prods., Inc.,* 167 Ariz. 383, 387, 807 P.2d 1119, 1123 (App. 1990) (citations omitted) ("In reviewing factual determinations, our respective roles begin and end with determining whether there was substantial evidence to support the administrative decision.... The question whether substantial evidence supports the state land commissioner's order does not raise material issues of fact; it presents a question of law.").

Id. at 33-34, ¶ 11 (emphasis added).

A deferential standard of review is not unusual in administrative law. The standard in federal law is perhaps best articulated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 844 (1984) wherein the United States Supreme Court stated

> We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations. (citations omitted).

Arizona courts have advocated a similar deferential standard for administrative review. Arizona courts "will allow an administrative decision to

stand if there is any credible evidence to support it." *Eaton v. AHCCCS*, 206 Ariz. 430, 432, ¶ 7, 79 P.3d 1044, 1046 (App. 2003). Even "[i]f two inconsistent factual conclusions could be supported by the record, then there is substantial evidence to support an administrative decision that elects either conclusion." *Webster v. State Bd. of Regents*, 123 Ariz. 363, 365-66, 599 P.2d 816, 818-19 (App. 1979). In addition, trial courts are required to "defer to the agency's factual findings and affirm them if supported by substantial evidence." *Gaveck v. Ariz. State Bd. of Podiatry Examiners*, 222 Ariz. 433, 436, ¶ 11, 215 P.3d 1114, 1117 (App. 2009) (citations omitted). *See also Croft v. Arizona State Bd. of Dental Examiners*, 157 Ariz. 203, 208, 755 P.2d 1191, 1196 (App. 1988) (superior court required to "show a certain degree of deference to the judgment of the agency based upon the accumulated experience and expertise of its members." (citation omitted); *see also W. States Petroleum, Inc. v. Ariz. Dept. of Env't. Quality*, 232 Ariz. 252, 253, ¶ 7, 304 P. 3d 539, 540 (App. 2013) ("We view the evidence in the light most favorable to upholding the administrative decision.")

The Superior Court was not supposed to "function as a 'super agency' and substitute its own judgment for that of the agency where factual questions and agency expertise are involved." *DeGroot v. Arizona Racing Comm'n*, 141 Ariz. 331, 336, 686 P.2d 1301, 1306 (App. 1984) citing *Arizona Bd. of Regents v. Superior Court*, 106 Ariz. 430, 477 P.2d 520 (1970). The Commission's decision as to what

the public interest and convenience required under the circumstances before the agency is "entitled to great weight." *Baca v. Ariz. Dep't of Econ. Sec.*, 191 Ariz. 43, 45-46, 951 P.2d 1235, 1237 (App. 1997); *see also U.S. Parking Sys. v. City of Phoenix*, 160 Ariz. 210, 211, 772 P.2d 33, 34 (App. 1989) ("Judicial deference should be given to agencies charged with the responsibility of carrying out specific legislation, and ordinarily an agency's interpretation of a statute or regulation it implements is given great weight." (citations omitted)).

Presumably, the Resort will argue that the Commission was not entitled to deference because it was acting outside its authority. As discussed above, this was not the case. The Commission had authority under A.R.S. §§ 40-321(A), 331(A) and 361(B) to order Liberty (BMSC) to make additions, improvements or other changes to its utility system to promote the public convenience. The Commission was free to weigh the evidence, accepting and rejecting the parties' positions in its discretion, and the Superior Court was required to defer to that decision absent a showing it was not supported by credible evidence. *See Grand Canyon Trust,* 210 Ariz. at 33-34, ¶¶ 9-11, 107 P.3d at 359*; Gaveck*, 222 Ariz. at 436, ¶ 11, 215 P.3d at 1117.

Such deference was confirmed in *Grand Canyon Trust*. That case involved an appeal to this Court from a superior court decision affirming a decision of the Commission authorizing the construction of a coal-powered electric generating unit

by Tucson Electric Power ("TEP"). The CEC was approved by the Commission in Decision No. 55477 and conditioned on TEP obtaining an order finding that the electricity to be produced by that unit was necessary to provide an " 'adequate, economical and reliable supply of electric power' to its customers all in accordance with the requirements of A.R.S. § 40–360.07(B)" prior to undertaking any construction. 210 Ariz. at 32, ¶¶ 2-3, 107 P.3d at 358. Thus, like this case, *Grand Canyon Trust* involved an appeal under A.R.S. § 40-254 of a Commission decision issued in accordance with the agency's statutory authority.

The Resort improperly seeks to distinguish this Court's ruling in *Grand Canyon Trust* by asserting that "the standard of review was not an issue," and that all of the cases this Court cited in explaining the standard of review were rate cases. Resort Br. at 30-31. These arguments fail. This Court's discussion of the standard of review applicable to an appeal brought pursuant to A.R.S. § 40-254 in *Grand Canyon Trust* is directly applicable to this case.

In its moving papers, the Resort asserted that the Decision "was not supported by substantial evidence." EIR 197 at 4. The Superior Court reviewed the record before the Commission and disagreed. It properly held that the Resort had failed to meet its burden to show by clear and convincing evidence that the Phase 2 Decision was unreasonable, unlawful, or unsupported by substantial evidence. In so ruling, the Superior Court followed the correct standard of review.

B. The Owens Affidavit Missed the Point and was Properly Rejected by the Superior Court.

In response to the Commission's motion for summary judgment, the Resort proffered the Affidavit of Robert L. Owens, II, P.E. ("Owens Affidavit"). EIR 174. Owens – who did not testify or provide evidence at the ALJ hearing – opined without even visiting the Plant, that there may be things that could have been done to determine with greater certainty the source of the odors and noises the customers wanted eliminated. Resort Br. at 31. The Superior Court correctly held that Owens was offering his opinion that the Commission failed to order plant closure based upon sufficient evidence. EIR 197 at 5. Whether the Phase 2 Decision was supported by substantial evidence is a matter of law, not fact, and the Owens Affidavit was not admissible on that point. *Id.* However, even if it had been admitted, the affidavit would not affect the Court's ruling given the record.

The Resort's argument that this ruling should be overturned because the substantial evidence standard does not apply is flat wrong. Resort Br. at 32-33. As discussed above, this is the standard of review of Commission decisions challenged pursuant to A.R.S. § 40-254. As this Court explained in *Grand Canyon Trust*, while the Resort was allowed on appeal to present new evidence that it failed to present to the Commission, the nature of the Superior Court's inquiry and the Resort's burden of proof were unchanged. 210 Ariz. at 34, ¶ 12, 107 P.3d at 360 ("The inquiry remains whether, even in light of the new evidence, there is substantial

evidence supporting the Commission's decision."). The Superior Court was therefore free to find, as it did, that the Commission's decision was supported by substantial evidence and that the Resort failed to present clear and convincing evidence otherwise, including the Owens Affidavit.

C. The Resort's Disagreements with Certain Facts are not the Same as Material Facts in Dispute.

The Resort argues that disputed issues of fact precluded summary judgment against it. Resort Br. at 34-49. In other words, the Resort disagrees with the Superior Court's decision to uphold the Commission's decision. But it was not the Superior Court's role to substitute its judgment for that of the Commission by assessing the facts offered by the Resort differently than the Commission. *Grand Canyon Trust*, 210 Ariz. at 33, ¶ 10, 107 P.3d at 359; *see also Tucson Elec. Power*, 132 Ariz. at 243, 645 P.2d at 234. Rather, the Superior Court could only ask whether the Resort had shown by clear and convincing evidence that the Commission's decision – that the location of the Plant could no longer be maintained consistent with the public interest and convenience – was supported by reasonable, lawful, and substantial evidence.

The Superior Court reviewed the Commission's careful and lengthy record, which contained substantial evidence concerning how the Plant's location, in the midst of a residential community, had caused intractable issues concerning odor and noise. *This evidence was admitted, in large part, without objection or rebuttal from the Resort. See, e.g.*, EIR 141, Ex. 3 at 44:3-28 [APP047]. The Resort had every

opportunity to submit evidence on the issues of odor, noise, and the Plant's location, but choose not to do so.[8] Nor did the Resort produce any evidence demonstrating that other measures were available in lieu of Plant closure. *Id.* [APP047]. On this record, the Superior Court's finding that substantial evidence was present is both factually and legally defensible – indeed it is the only conclusion the Superior Court could have reached – and should be upheld by this Court.

IV. The Superior Court Correctly Held that There Was No Unconstitutional Impairment of Contract.

The Resort asserts that the Phase 2 Decision violates the United States and Arizona Constitutions because it "deprives [the Resort] of its contractual rights to continued effluent delivery through March 2021." Resort Br. at 49. The Superior Court rejected this claim, finding that closure of the plant was clearly contemplated and foreseen in the Effluent Delivery Agreement between the Resort and Liberty (BMSC), notwithstanding the Resort's "professed surprise." EIR 197 at 6.

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[8] The Resort has consistently complained about the Commission's consideration of public comment. *E.g.*, Resort Br. at 42; EIR 197 at 7. The Resort, however, made no effort to present evidence or argument in response to the public comment. Furthermore, the Commission took care to explain the relevance of public comment received in issuing the Phase 2 Decision. Specifically, the Commission stated that public comment is "not evidence *per se*" but that "public comment provides useful insight to the Commission regarding customer experiences." EIR 141, Ex. 3 at 45:8-10 [APP048] (quoting Phase 1 Decision). Given this distinction—and considering the Resort's failure to submit controverting evidence—the Resort's complaints about the *quality* of information the Commission considered in ordering closure of the Plant lack merit.

One cannot be "surprised" by the very result expressly contemplated in one's contract – a contract negotiated by the Resort's predecessor's lawyers. There is no "contractual impairment" here. The contract is working as expressly contemplated and anticipated by the parties.

The threshold question in any contract impairment claim is whether a state's action substantially impairs the complaining party's contractual rights. *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 411 (1983). Under prevailing law, "[a] statute does not substantially impair a party's contract rights unless it adversely affects that party's reasonable expectations under the contract." *Liberty Mut. Ins. Co. v. Whitehouse*, 868 F. Supp. 425, 431 (D.R.I. 1994) citing *Energy Reserves Group*, 459 U.S. at 416.

Here, the contract expressly contemplates and allows for the closure of the Plant by the Commission or a court, terminating Liberty (BMSC)'s obligation to deliver effluent to the Resort:

> The obligations of [Liberty (BMSC)] under this paragraph [6] shall terminate if physical conditions at the Boulders East Plant or any laws, regulations, *orders or other regulatory requirements prevent or materially limit the operation of the Boulders East Plant* or render the operation of such plant uneconomic.

EIR 142, Ex. 5 ¶ 6 [APP135] (emphasis added). This language confirms and acknowledges the power of the Commission or others to issue orders that affect the Plant, including an order to close it. When parties bind themselves by a lawful

contract, the terms of which are clear and unambiguous, effect must be given to the contract as written. *See Mining Inv. Group, LLC v. Roberts*, 217 Ariz. 635, 639, ¶ 16, 177 P.3d 1207, 1211 (App. 2008). The law of contracts provides no basis upon which courts may "alter, revise, modify, extend, rewrite or remake an agreement." *Id. See also Employers Mut. Cas. Co. v. DGG & CAR, Inc.*, 218 Ariz. 262, 267, ¶ 24, 183 P.3d 513, 518 (2008) (plain and unambiguous contract language must be applied as written).

The Resort also argues that the contract was impaired because the decision of the Commission was unique and not an industry wide regulation. Resort Br. at 52-53. As such, the Resort asserts that it could not reasonably expect an order of the Commission closing the plant. *Id.* This is the same sort of hair-splitting underlying the Resort's claim that the statutes do not specify plant closure. The Resort expressly agreed that Liberty (BMSC)'s contractual obligations could be altered (indeed terminated) by any order limiting operation of the Plant, and the Resort could not have any *reasonable* expectation otherwise. *See Roberson v. Wal-Mart Stores, Inc.*, 202 Ariz. 286, 291, ¶ 18, 44 P.3d 164, 170-71 (App. 2002) (holding that clear disclaimer undercut plaintiff's claim of "reasonable expectations" contrary to disclaimer language).

Because the Resort reasonably expected and knew of the possibility of an order requiring Liberty (BMSC) to close the Plant, there cannot possibly be any

contract impairment from an order that the Plant be closed. In other words, the Phase 2 Decision does not interfere with the Resort's "reasonable expectations under the contract" that the Plant would remain open until March 2021 under all circumstances because such a reasonable expectation never existed.

CONCLUSION

Liberty (BMSC) respectfully requests that the Court affirm the Superior Court's ruling in all respects.

RESPECTFULLY SUBMITTED this 5th day of February, 2015.

SHAPIRO LAW FIRM, P.C.

By */s/ Jay L. Shapiro*
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Attorneys for Black Mountain Sewer Corporation

ARIZONA COURT OF APPEALS
DIVISION ONE

WIND P1 MORTGAGE BORROWER L.L.C., a Delaware limited liability company, Plaintiff/Appellant, v. ARIZONA CORPORATION COMMISSION, an agency of the State of Arizona; BLACK MOUNTAIN SEWER CORPORATION, an Arizona corporation; TOWN OF CAREFREE, an Arizona municipal corporation, Defendants/Appellees.	No. 1-CA-CV 14-0643 Maricopa County Superior Court No. CV2013-007804
THE BOULDERS HOMEOWNERS ASSOCIATION, an Arizona non-profit corporation, Intervenor/Appellee.	

REPLY BRIEF OF APPELLANT WIND P1 MORTGAGE BORROWER L.L.C.

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INTRODUCTION

Wind P1 Mortgage Borrower L.L.C. ("Wind P1") submits this Reply Brief to reply to all three of the answering briefs to the extent the arguments raised are not already addressed in Wind P1's Opening Brief:

- Arizona Corporation Commission's ("Commission" or "ACC") Answering Brief ("ACC Ans.")
- Black Mountain Sewer Corporation's ("BMSC") Answering Brief ("BMSC Ans.")
- The Boulders Homeowners Association's ("BHOA") Answering Brief ("BHOA Ans.").

REPLY TO PARTIES' STATEMENTS OF THE CASE

Wind P1 makes no response to the parties' statements of the case or cited evidence, with one exception. BMSC cited to certain public comments that were not admitted into evidence in the Commission's hearing, and Wind P1 has consistently objected to consideration of such comments, including filing a Motion to Strike portions of the Commission's written Decision that rely on the substance of such comments as evidence. *See* BMSC Ans. at pp. 19-20. The comments were not offered or admitted in evidence at the Commission's hearing, and Wind P1 had no opportunity to cross-examine witnesses regarding the substance of such

comments. *See* Index of Record docketed October 3, 2014 ("I.R.") 143, Ex. 17 (Wind P1 Motion to Strike).

ARGUMENT

I. STANDARD OF REVIEW

The parties agree this Court reviews the Superior Court's decision, but neither the Commission nor BMSC quote the applicable standard of review that the Superior Court must apply in deciding whether to grant a summary judgment motion. ACC Ans. at pp. 16-17; BMSC at p. 23. It is well established that this Court in reviewing a Superior Court's grant of summary judgment reviews the facts and reasonable inferences in the light most favorable to the party against whom the Superior Court granted summary judgment. *Phelps Dodge Corp. v. Ariz. Elec. Power Co-op., Inc.*, 207 Ariz. 95, 103, 83 P.3d 573, 581 (App. 2004) (internal citations omitted) ("*Phelps Dodge*"). Any evidence or reasonable inference contrary to the material facts needed for judgment will preclude summary judgment. *United Bank of Ariz. v. Allyn*, 167 Ariz. 191, 195, 805 P.2d 1012, 1016 (App. 1990), *review den'd* (citation omitted). This Court applies the same standard as that used by the trial court in ruling on the summary judgment motion in the first instance. *Id.*

II. ISSUE 1: COMMISSION LACKS AUTHORITY TO ORDER CLOSURE OF A COMPLIANT PLANT TO REMEDIATE ALLEGED NUISANCE CONDITIONS ON NON-UTILITY PROPERTIES

A. Superior Court Correctly Concluded that the Commission Has No Constitutional Power to Order Plant Closure

Even though the Commission and BMSC both argue that the Commission has express *statutory* authority to support its plant closure order under A.R.S. §§ 40-321(A), 40-331(A), and 40-361(B), the Commission and BHOA[1] go further and urge this Court to determine that the Commission has independent "concurrent" legislative authority with the Legislature to order plant closure under the following phrase in Arizona Constitution Article XV, section 3: ". . . and make and enforce reasonable rules, regulations, and orders for the convenience, comfort, and safety, and the preservation of the health, of the employees and patrons of such corporations." *See* ACC Ans. at pp. 24-26; BHOA Ans. at p. 5; BMSC Ans. at p. 24. The Commission essentially urges that, even though binding case law holds that the Commission *may not regulate a public utility's business regarding non-ratemaking matters* under the Commission's broad plenary ratemaking power at the beginning of Article XV, Section 3, the Commission *may still regulate a public utility's business regarding non-ratemaking matters* under its less generous, but

[1] BMSC chose not to support the Commission's and BHOA's arguments regarding the Commission's constitutional authority, arguing instead that it is unnecessary to address the issue. BMSC Ans. at p. 24.

"concurrent," legislative authority in the latter part of section 3 so long as the regulation involves, as pertinent here, a customer comfort matter.

The implication of the Commission's argument regarding the meaning of Article XV, section 3, is that the Commission need not comply with the express boundaries of the Legislature's enactments because the Commission is free to legislate anew on all matters relating to "convenience, comfort, and safety, and the preservation of the health, of the employees and patrons of [regulated] corporations." *See* Ariz. Const. Art. 15, section 3. For example, following the Commission's argument here, even if the Legislature carefully chooses a workplace safety law, or perhaps a health insurance requirement, that strikes a balance between the interests of the employer and employee, the Commission would argue that it is free to strike a different balance as to those employees of regulated utilities, either promulgating rules on a statewide basis, or issuing ad hoc orders that treat regulated utilities differently in individual cases, as the Commission did in this case.

The Commission's and BHOA's arguments urging a "concurrent" legislative authority finding are inconsistent with binding Arizona Supreme Court precedent. *See* ACC Ans. at p. 26, n. 133; BHOA Ans. at pp. 4-5. The Supreme Court in the *Woods* case recognized the *Pacific Greyhound* case is still binding, and the *Pacific Greyhound* case specifically examined the "extent of the authority of the

commission as to regulation of the business of such corporations" on matters other than ratemaking. *Ariz. Corp. Comm'n v. State ex rel. Woods*, 171 Ariz. 286, 293, 830 P.2d 807, 814 (1992) (*"Woods"*), *quoting from Corp. Comm'n v. Pacific Greyhound Lines*, 54 Ariz. 159, 168, 94 P.2d 443, 447 (1939) (*"Pacific Greyhound"*) (*"Pacific Greyhound"*). The Supreme Court in *Woods* found the *Pacific Greyhound* case, and subsequent cases relying on it, had been the law for over 50 years, and specifically rejected the opportunity to revisit history to change it. *Woods*, 171 Ariz. at 293–94, 830 P.2d at 814–15 ("therefore, we measure the Commission's regulatory power by the doctrine apparently established by *Pacific Greyhound* and its progeny—that the Commission has no regulatory authority under article 15, section 3 except that connected to its ratemaking power.").

The Supreme Court has already interpreted the *Pacific Greyhound* case in the context of the Commission's non-ratemaking regulatory authority, holding that the Commission lacks authority to regulate convenience matters through the "convenience, comfort, safety . . ." language in Article XV, section 3. *See Williams v. Pipe Trades Industry Program of Ariz.*, 100 Ariz. 14, 17, 409 P.2d 720, 722 (1966) (Constitution does not authorize Commission to issue public certificates of convenience and necessity); *Southern Pac. Co. v. Ariz. Corp. Comm'n*, 98 Ariz. 339, 346, 404 P.2d 692, 696 (1965) (Constitution does not authorize Commission to order provider to restore discontinued railroad service);

see also Phelps Dodge, 207 Ariz. at 112–14, 83 P.3d at 590–92, ¶¶57–60, 66–68 (Commission lacked constitutional authority to promulgate rules requiring utilities to create independent schedulers to oversee fair access to facilities, to divest of certain assets at a certain time); *see also Trico Elec. Co-op. v. Ralston*, 67 Ariz. 358, 363, 196 P.2d 470, 473 (1948) (finding no judicial authority to adjudicate contracts in Art. 15, sec. 3).

Under this binding precedent, the Commission did not have authority under Art. XV, section 3, to order a utility to close a particular treatment plant, because such an order was not reasonably necessary for ratemaking.

B. Superior Court Erred in Concluding the Commission Has Statutory Authority to Order Plant Closure under A.R.S. §§ 40-321(A), 40-331(A), and 40-361(B)

1. There is No Express Authority in Cited Statutes to Support the Commission's Action

Other than disagreeing with Wind P1's ultimate conclusion regarding the content of the express language in the statutory authorities at issue, the Commission failed to respond to the substance of Wind P1's arguments regarding the plain meaning of certain words in the statutes. Specifically, A.R.S § 40-321(A) requires a finding that a facility standard or service standard is not being met, and requires identification of a standard. A.R.S § 40-331(A) provides that the action must promote security and convenience. A.R.S § 40-361(B) grants no authority to the Commission, but, if a utility is in violation, may be enforced through the

Commission's express enforcement statutes. *See* Opening Brief at pp. 15-19; ACC Ans. at pp. 17-19.

BMSC asserts repeatedly without explanation that the plant closure order promoted the "public convenience" under A.R.S. § 40-331(A), but fails to acknowledge that an order to close an existing treatment plant does not affect in any manner the "convenience" of the underground sewer collection service already provided directly to each customer's home. *See* BMSC Ans. at pp. 25–26, 29, 33. This was not a case where utility service was not yet reasonably accessible to homes – convenient service was already being provided directly to homes. The Commission's plant closure order was instead a political reaction to customer complaints of discomfort or distaste – not complaints about a lack of reasonable access to utility services.

The Commission and BHOA both failed to address Wind P1's argument that the Commission is not authorized to enforce A.R.S. § 40-361 through a plant closure order, but must instead enforce noncompliance through its express enforcement authorities in Title 40, Article 9. *See* Opening Brief at pp. 19-20. The Commission lacked express authority under any of the three statutory sections it relied upon for the authority to order a plant closure for the purpose of remediating alleged nuisance conditions on *other* properties.

2. The Legislature Did Not Intend to Grant the Commission Authority to Issue Plant Closure Orders to Remediate Alleged Nuisance Conditions on Off-Site Properties

The Commission mischaracterizes Wind P1's argument on pages 18-25 of the Opening Brief regarding statutory interpretation of potentially ambiguous terms in A.R.S. §§ 40-321(A), 40-331(A), and 40-361(B)[2], by reference to later ADEQ statutes as an implied "repeal" argument. ACC Ans. at pp. 19–22. Wind P1 argued, and has consistently argued throughout these proceedings, that the Commission never had the statutory authority to order a plant closure to remediate alleged off-site nuisances. Opening Brief at pp. 15–18.

The Commission is incorrect to argue that the issue of statutory interpretation is being raised for the first time on appeal. ACC Ans. at p. 20; Opening Brief at pp. 20–27. Wind P1 has argued the meaning and application of the three statutes upon which the Commission bases its claim of statutory authority throughout the underlying Commission proceedings and in in front of the Superior Court. I.R. 141, Ex. 3 at 38:8-22, 42:13-21 (noting Wind P1's argument regarding Legislature's grant of specific authority to ADEQ); *see also* I.R. 139 at 7-10 (arguments regarding meaning and application of statutes).

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[2] The Commission refers in its argument to A.R.S. § 40-202 as granting it authority to make orders regarding the comfort and convenience of customers, but this section has been held to grant the Commission no power in addition to those powers it already possesses under the Constitution. *Phelps Dodge*, 207 Ariz. at 112, 83 P.3d at 590 (internal citation omitted).

The Commission argues that its powers extend generally to matters relating to the health, safety and welfare of public service corporation customers. ACC Ans. at p. 20. But, again, the Commission fails to explain how the words used by the Legislature in each of the three statutes at issue[3] can be interpreted through the rules of statutory construction to provide the Commission with express authority to order a plant closure to address alleged nuisance conditions on non-utility properties.

If the three statutes are instead interpreted as a group to imply authority to make unrestricted "orders" regarding infrastructure with the only connection to the statutory language being the words "health and safety, comfort and convenience," then such a statute would be an unconstitutional (and complete) delegation of the Legislature's police power to the Commission. *State v. Marana Plantations, Inc.*, 75 Ariz. 111, 114–15, 252 P.2d 87, 89–90 (1953) (finding statute granting Board of Health power to "regulate sanitation and sanitary practices in the interests of public health" unconstitutionally delegated legislative power to an administrative agency).

The three statutes at issue do not grant the Commission unrestricted power to make any order it chooses in the name of customer comfort. There is no basis for the Court, given the context, language, subject matter, historical background,

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[3] The Commission's argument regarding its authority under Ariz. Const. Art XV, § 3 is addressed in section II.A of this brief.

effects, consequences, spirit, or purpose of these statutes, to conclude that the Legislature intended to imbue the Commission with standardless police power to legislate the Commission's own agenda.

Wind P1 notes that the Commission characterizes the plant closure order as remedying "an ongoing deficiency with BMSC's facilities." ACC Ans. at p. 22. This is an incorrect characterization of the evidence in this case. The Commission found nothing wrong with the WWTP facility. I.R. 140, ¶¶ 24, 33; *see also* BMSC Ans. at p. 17 (agreeing that the WWTP facility fully complied with all applicable regulations and standards). The Commission's Decision found only that the *location* of the facility was no longer "in the public interest." I.R. 141, Ex. 3 at 49:16-19; BMSC Ans. at p. 17. The Commission's Decision thus related to land use, and was not a determination that the facility was deficient.

3. The *Palm Springs* Case Does Not Apply

Wind P1 already addressed most of the Commission's arguments regarding the *Palm Springs* case in its Opening Brief. *See* Opening Brief at pp. 25–26; *Ariz. Corp. Comm'n v. Palm Springs Utility Co., Inc.*, 24 Ariz.App. 124, 56 P.2d 245 (App. 1975). The Commission urges that, based upon statements in *Palm Springs*, this Court has already recognized the Commission's legal authority in the three statutes at issue to require a utility to deliver utility service that exceeds regulatory standards. ACC Ans. at pp. 22–24. The Commission's response fails to

acknowledge that the Commission in the *Palm Springs* case required the utility to deliver water that met an objective, numeric federally-recommended water quality standard that the Commission found was not being met, which is quite different from the present case in which no standard was identified. Here, the Commission found the WWTP met all regulatory ***and industry*** standards and, rather than ordering service that met a certain standard, instead ordered one part of a multi-part odor-generating system to be closed. There was *no competent evidence* presented from which the Commission could determine that ordering the plant closure would resolve future odor complaints; in fact, it is undisputed that other odor-generating facilities also exist near the homes. I.R. 140, ¶22, ¶23; I.R. 143, Ex. 15 (pp. 617-19, 639-40) (ACC's staff engineer testified closure of WWTP would not eliminate odor from the remaining lift stations and collection system). In sum, *Palm Springs* cannot be used as a substitute for applying the statutory language to the facts of this case.

III. ISSUE 2: THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WHERE DISPUTES OF MATERIAL FACT WERE DEMONSTRATED, DENYING PLAINTIFF A TRIAL DE NOVO

A. Trial Court Erroneously Applied "Substantial Evidence" Rate Case Standard Instead of "Trial de Novo" Non-Rate Case Standard Required By A.R.S. § 40-254

The Superior Court erred in two ways when it weighed the evidence under the "substantial evidence" standard in the context of evaluating the Commission's summary judgment motion.

First, this case is not a rate case, so there is no constitutional constraint on the court's full review of the case under the plain language of A.R.S. § 40-254. A.R.S. § 40-254 requires the Superior Court to conduct an independent trial similar to a trial in a civil action, and then determine if the Superior Court is convinced by clear and satisfactory evidence that the Commission's action "is unreasonable or unlawful." There is no "substantial evidence" standard language in A.R.S. § 40-254(A) – the "substantial evidence" standard is a judicial limitation placed on court review of rate cases only.

Second, the Superior Court failed to apply the summary judgment standard under Rule 56(a), *Ariz.R.Civ.P.*, and thereby erred in denying Wind P1 a trial de novo to which it is entitled under A.R.S. § 40-254 (whether or not the substantial evidence standard is eventually applied to weigh the admitted evidence). The Superior Court here took a short cut, bypassed the trial de novo requirement, and

proceeded directly to a post-trial evidence evaluation standard (and not the right one) to weigh the evidence. *See Northern Contracting Co. v. Allis-Chalmers Corp.*, 117 Ariz. 374, 376, 573 P.2d 65, 67 (1977) (neither the trial court nor the appellate court may weigh the evidence in evaluating a motion for summary judgment) (citations omitted).

1. The *Grand Canyon Trust* Case Was Decided by the Superior Court on Motions without a Trial by Stipulation of the Parties

As noted in the Opening Brief, the Arizona Supreme Court has held that A.R.S. § 40-254 provides for a trial de novo in Superior Court in which the trial court weighs evidence and draws an independent conclusion subject only to the constraint that the burden of proving the invalidity of the Commission's conclusion is on the party adverse to the Commission (and subject to a recognized constitutional constraint for rate decisions not applicable here). *See Tucson Elec. Power Co. v. Ariz. Corp. Comm'n,* 132 Ariz. 240, 243, 645 P.2d 231, 234 (1982) ("*Tucson Electric*"), *quoting Rate Decisions: Judicial Review of the Arizona Corporation Commission*, 19 Ariz. L. Rev. 488, 493 (1977) *and citing Ariz. Corp. Comm'n v. Fred Harvey Transp. Co.*, 95 Ariz. 185, 190, 388 P.2d 236, 239 (1964) (recognizing numerous Arizona cases unequivocally held the superior court must exercise independent judgment); *Corp. Comm'n of Ariz. v. People's Freight Line*, 41 Ariz. 158, 161, 16 P.2d 420, 421 (1932) (the proceeding is a new and

independent action heard de novo upon proper evidence, and not merely upon review of the evidence taken before the commission; trial court not bound to defer); *Ariz. Corp. Comm'n v. Reliable Transp. Co.*, 86 Ariz. 363, 371, 346 P.2d 1091, 1096 (1959) ("the superior court may properly hold an order unreasonable on the basis of 'clear and satisfactory evidence' presented to it, whereas it may be perfectly apparent that the Commission acted reasonably on the basis of the evidence which it had to consider"); *Corp. Comm'n v. Southern Pac. Co.*, 55 Ariz. 173, 175–76, 99 P.2d 702, 703 (1940) ("the proceeding is not an appeal from the decision of the commission" but rather a new, independent action requiring review of new evidence from that presented to the commission).

Both the Commission and BMSC in their response briefs confuse this Court's standard of review applicable to the Superior Court's grant of a summary judgment motion under Rule 56, *Ariz.R.Civ.P.*, with the burden of proof applicable to the Superior Court's weighing of evidence after all evidence has been presented at a trial. *See* A.R.S. § 40-254(E) (burden of proof). Both parties imply repeatedly in their briefs that this Court in *Grand Canyon Trust v. Ariz. Corp. Comm'n* effectively changed the above-cited law regarding the trial de novo process in Superior Court by newly equating the burden of proof in 40-254(E) with the constitutionally-constrained standard of review applicable to rate cases – the "substantial evidence" test. *See* ACC Ans. at 27-28 *and* BMSC Ans. at 30-34

relying on Grand Canyon Trust v. Ariz. Corp. Comm'n, 210 Ariz. 30, 34, 107 P.3d 356, 360 (App. 2005).

In its Opening Brief, Wind P1 explained the history of the "substantial evidence" standard applied by courts to review of rate cases under A.R.S. § 40-254. Opening Brief at pp. 26–30. However, even if such a deferential standard applied to the ultimate determination in this case, as urged by the ACC and BMSC (it does not under the authority cited above), such a standard would be applied by the Superior Court to evaluate the strength of all the evidence *after a trial de novo*. A trial never occurred in this case.

The *Grand Canyon Trust* case was simply at a different stage of appellate review than the present case. As stated in the description of the procedural history in the *Grand Canyon Trust* case, "[t]he parties stipulated that, given the substantial evidentiary record developed in proceedings before the Commission, the action should be submitted to the superior court on dispositive motions similar to appellate briefs." *Grand Canyon*, 210 Ariz. at 33, 34, 107 P.3d 356, 360. The standard of review applied by the Superior Court in *Grand Canyon Trust* was, by stipulation of the parties, a post-trial standard where all the evidence is in front of the court acting as fact finder for a final determination. *No such stipulation was made in this case*. The Superior Court did not have all the evidence before it in the parties' summary judgment motions. At the summary judgment stage, the Superior

Court is charged not with making a final decision on the merits of the case, but instead must determine if there is a dispute of material fact for trial. Any evidence or reasonable inference contrary to the material facts needed for judgment will preclude summary judgment. *United Bank of Ariz. v. Allyn*, 167 Ariz. 191, 195, 805 P.2d 1012, 1016 (App. 1990), *review den'd* (citation omitted). Because the parties' motions demonstrated material facts in Wind P1's favor, at a minimum, Wind P1 should have been allowed to present evidence at a trial. The Superior Court here erroneously simply deferred to the Commission as a matter of law by applying the substantial evidence standard as if the parties had stipulated to an appellate briefing and decision procedure similar to the stipulated procedure that occurred in *Grand Canyon Trust*. This was not the independent review of the facts required by A.R.S. § 40-254.

Even if it may seem burdensome for the Superior Court to conduct a full-blown trial de novo for all cases brought under A.R.S. § 40-254, the Legislature has not changed this longstanding trial de novo requirement, and it still applies. In contrast, in 1991, the Legislature enacted A.R.S. § 40-254.01, providing for direct appeals to the Court of Appeals in rate cases, precisely to eliminate the burdensome trial de novo requirement for rate cases. *Consolidated Water Utilities, Ltd. v. Ariz. Corp. Comm'n,* 178 Ariz. 478, 481, 875 P.2d 137, 140 (App. 1993) (finding Legislature eliminated de novo requirement in rate cases to reduce

burden). The Legislature did *not* change the existing trial de novo requirement for non-rate cases. This case is not a rate case.

2. Supreme Court Case Law Interpreting A.R.S. § 40-254 Has Not Been Overruled and Has No Expiration Date

The ACC further challenges the application of the trial de novo requirement in A.R.S. § 40-254 by asserting that the Arizona Supreme Court law interpreting this section is "dated," addresses "CC&Ns," and the cases largely dealt with the transportation industry. ACC Ans. at pp. 28–29. The ACC cites no legal authority supporting these arguments, and cites no supporting text in § 40-254 for drawing any distinction between Certificate of Convenience and Necessity ("CC&N") cases and other cases brought under the Commission's statutory authorities. There is no rational distinction to be drawn in the context of reviewing a summary judgment motion between a factual scenario involving a CC&N (an order finding it convenient and necessary for a regulated entity to provide utility service in a certain area) and a factual scenario involving the Commission's evaluation of the adequacy of such service under another statute, nor is there any rational basis to distinguish the type of service under A.R.S. § 40-254.

Further, there is no expiration date on the validity of Arizona Supreme Court case law interpreting the same statute (A.R.S. § 40-254), a statute that has been in effect substantially unchanged since 1912. *See* Laws 1912, Ch. 90, § 67; Civ. Code 1913, § 2343; Rev. Code 1928, § 720; Code 1939, § 69-249. The Supreme

Court again reviewed the standard in detail in 1982 in *Tucson Electric,* agreeing with the dissent's statement in that case that, despite the different levels of review applicable to rate and other cases, the whole concept of the de novo review in 40-254 "is the right to introduce new evidence before any determination is made by the court." *Tucson Elec. Power Co. v. Ariz. Corp. Comm'n*, 132 Ariz. 240, 244, 645 P.2d 231, 235 (1982).

Because a trial is required in all cases brought under the statute, the appropriate standard of review in this case is the summary judgment standard; not a post-trial standard regarding the weight to be given to such evidence. The Commission and BMSC both argue that the Superior Court must grant deference to Commission decisions, but that is not the standard this Court applies in reviewing a grant of a summary judgment motion. ACC Ans. at pp. 29–31, BMSC Ans. at pp. 31–34 (citing a number of cases decided under inapplicable appeal statutes). This Court reviews the facts and reasonable inferences in the light most favorable to the party against whom the Superior Court granted summary judgment. *Phelps Dodge Corp. v. Ariz. Elec. Power Co-op., Inc.*, 207 Ariz. 95, 103, 83 P.3d 573, 581 (App. 2004) (internal citations omitted).

B. Trial Court Erred in Denying Admission of Affidavit of Robert Owens Based on Erroneous Application of "Substantial Evidence" Standard

Wind P1 has already addressed the arguments made by the Commission and BMSC regarding the legal standard applicable to a determination of the admissibility of the Owens Affidavit, with one exception.[4] *See* Opening Brief at pp. 31–33. The Commission argues, in essence, that the Owens expert opinion, even though it addresses only information already in the Commission's hearing record, is inadmissible because the expert opinions expressed in the Affidavit were formed and committed to writing after the Commission's Decision was made. ACC Ans. at pp. 32–34. The Commission supports this statement with case law providing that evidence of *circumstances* occurring subsequent to a Commission hearing is not admissible. ACC Ans. at p. 33, n.154. The Commission's position is not consistent with the cited case law or historic practice. The cited cases clearly acknowledge that new evidence may be admitted in a trial de novo in Superior Court. *See, e.g., Sulger v. Ariz. Corp. Comm'n*, 5 Ariz.App. 69, 71, 423 P.2d 145, 147 (1967) (new evidence and witnesses were introduced in Superior Court); *State ex rel. Church v. Ariz. Corp. Comm'n*, 94 Ariz. 107, 110, 382 P.2d 222, 224 (1963)

[4] Wind P1 notes the Commission also raised an argument on pages 34-35 of its Answering Brief about the timing of disclosure of Mr. Owens as a witness, but this argument was considered by the Superior Court and was not the basis for the Superior Court's Ruling. The Commission could have requested additional time in the Superior Court if it felt prejudiced by the disclosure timing, but it did not.

("superior court is free to consider evidence which was not adduced before the commission") *and Gibbons v. Ariz. Corp. Comm'n*, 75 Ariz. 214, 217, 254 P.2d 1024, 1027 (1953) (lower court properly considered depositions of two witnesses taken after Commission decision); *Tucson Elec. Power Co. v. Ariz. Corp. Comm'n*, 132 Ariz. 240, 244, 645 P.2d 231, 235 (1982) (citing *State ex rel. Church* and *Gibbons* and holding that new evidence may be presented to the Superior Court).

As indicated in the aforementioned cases, the intent of prohibiting evidence of new *circumstances* arising after the Commission decision is to allow the Commission to continue its work as to such subsequent events. However, the Commission is not insulated under § 40-254 from the Superior Court's consideration of new *evidence* relating to events occurring prior to the Commission decision, even if the Commission was unaware of the evidence. The Commission's argument regarding the timing of the Owens opinion as a disqualifying factor makes no sense, because prohibiting new opinions about events that occurred prior to the Commission's Decision would completely eviscerate the trial de novo requirement in A.R.S. § 40-254. No witnesses could take the stand because their words would be formed and uttered after the Commission's hearing date. The Commission's argument is inconsistent with well-established case law that allows presentation of new evidence never seen or

considered by the Commission. New testimony and witnesses are allowed in a trial de novo under A.R.S. § 40-254.

C. The Evidence Cited by the Commission Demonstrates Disputed Facts Regarding the Alleged Odors and Noises, Their Sources, and the Effectiveness and Reasonableness of Closure as a Solution to the Unproven Remaining Problems

Whether the Commission's plant closure order was reasonable to address alleged nuisance conditions in a neighborhood depends on certain material facts. Under the statutes relied upon by the Commission (assuming the Court determines any of them provided the Commission's legal authority here), the Commission in its summary judgment motion in the Superior Court must have demonstrated, at a minimum, no dispute of fact regarding the following material facts:

- odors or noises still existed in an unreasonable amount at homes at the time of the Commission's evidentiary hearing on May 8, 2012 **[this fact would, under the Commission's argument, tend to establish that "service" is "improper" under § 40-321(A), or not "adequate" or "reasonable" under § 40-361(B), since it was undisputed that there was nothing wrong with the WWTP, and is a necessary fact to determine if the Commission's plant closure order was "unreasonable" under § 40-254]**;

- and if so, odors were actually coming from continued operation of the WWTP as opposed to other known odor sources **[this fact is necessary to tie the WWTP to the "improper" or "inadequate" or "unreasonable" condition in § 40-321(A) or § 40-361(B), and is necessary to determine reasonableness under § 40-254]**;
- closing the plant would reduce neighborhood odors in an amount that would resolve nuisance conditions given that other known odor sources would still be operating in the neighborhood **[this fact is necessary to establish the reasonableness of the Commission's action under all applicable statutes]**; and
- whether some objective standard exists that should reasonably be applied to the WWTP beyond the applicable legal and industry standards to which it undisputedly adheres **[the Commission must determine what is "proper" under § 40-321(A), and "adequate, efficient, and reasonable" under § 40-361(B) in order to determine that the WWTP or BMSC's service is not proper, adequate, efficient, or reasonable]**.

The facts do not support application of A.R.S. § 40-331(A) here because there was no "security" or "convenience" issue identified in the record.

Neither the Commission nor BMSC dispute Wind P1's description of the above multiple fact categories as material to the Court's evaluation of a grant of the Commission's summary judgment motion, and neither answering party make any attempt to cite facts to establish that no dispute of material fact exists in each of these categories. The Commission simplistically cites evidence it argues "supports the conclusion that the WWTP emits offensive odors." ACC Ans. at p. 37. The simple fact of whether the WWTP emitted odors that "offended" people, even if established, does not establish the other material facts described above that are necessary to determine whether the Commission's plant closure order was a lawful and reasonable response.

The Commission does not deny that evidence demonstrated the following:

- BMSC made extensive improvements to the WWTP prior to the Commission's hearing that effectively reduced odors and noises **[from which a fact finder could infer that post-improvement measurements were required to determine if current emissions levels were adequate, reasonable, and proper]**;
- there were no measurements of odor levels in evidence **[from which a fact finder could infer there was insufficient information to determine if odor emissions were adequate, reasonable, and proper]**;

- the evidence identified no odor emissions standard, regulatory or otherwise, that was not already met by the WWTP **[from which a fact finder could infer odor emissions were already controlled at an objectively adequate, reasonable, and proper level]**;[5]
- there are multiple odor-generation sources in the neighborhood other than the WWTP **[from which a fact finder could infer confusion on the part of residents submitting public comments as to the cause of odors]**;
- investigations of the 23 odor complaints made to BMSC by residents prior to the hearing found a number of the reported odors were caused by sources other than the WWTP **[from which a fact finder could infer confusion on the part of residents as to the cause of odors]**; and
- even the Commission's own engineer was unsure whether closure of the plant would remedy the odors that were the subject of public comments **[from which a fact finder could infer that it was unreasonable to order plant closure without further investigation of the cause of odors]**.

The Commission tries to minimize the above facts, which are in Wind P1's favor, by arguing that no reasonable fact finder could agree, given the quantum of

[5] The Commission blames Wind P1 for not presenting evidence regarding odor levels, and thereby incorrectly argues that Wind P1 had the burden of proof in the Commission's administrative hearing on BHOA's motion. ACC Ans. at p. 38. The parties stipulated that the WWTP already met all regulatory and industry standards – *there was nothing in the record for Wind P1 to rebut.* The Commission should have denied BHOA's motion for lack of supporting evidence.

evidence required, that the Commission's order was unlawful or unreasonable. *See* ACC Ans. at p. 40. Even considering the burden of proof Wind P1 will bear at trial, the quantum of facts here weighs in Wind P1's favor. The quantum of facts includes the glaring absence of material evidence to support the reasonableness of the Commission's plant closure order; this absence *alone* warranted the denial of the Commission's summary judgment motion, under a proper application of Rule 56, *Ariz.R.Civ.P.*

IV. ISSUE 3: THE TRIAL COURT ERRED IN CONCLUDING PLANT CLOSURE ORDER DID NOT VIOLATE CONSTITUTIONAL CONTRACT IMPAIRMENT CLAUSES

Wind P1 argued in its Opening Brief that the Superior Court erred in finding there was no substantial impairment of the Effluent Delivery Agreement because the Superior Court failed to apply the proper summary judgment standard to this issue, and because the court misinterpreted the law regarding whether a contractual impairment is substantial for the purpose of analyzing a Contracts Clause argument.

A. Material Issues of Fact Exist Regarding Wind P1's Reasonable Expectation of Regulation by Commission's Plant Closure Order

The Commission did not respond to Wind P1's argument regarding the summary judgment standard that should have been applied to the contract impairment issue. The Commission instead argued that it was appropriate for the Superior Court to interpret a phrase in the Effluent Delivery Agreement and

conclude that Wind P1 "reasonably expected" the plant could be ordered closed. ACC Ans. at pp. 46–48. The Commission's argument ignores the ambiguity demonstrated in the facts regarding the parties' intent in the Effluent Agreement as to future regulation by the Commission. The phrase cited by the Commission addresses authority to operate a wastewater treatment plant, a subject over which the Commission has not in the past exercised jurisdiction. Yet, as argued in the Superior Court, the same agreement stated in a separate provision (in a very detailed way) the parties' expectations regarding future regulation by the Commission, solely addressing potential rate changes. I.R. 142, Ex. 5 at 3-4 (charges for service). The Commission does not deny that its plant closure order was unprecedented. Further, the Commission agrees the plant closure order was a case-specific order with a requirement limited to the WWTP. This was not industry regulation; this was an order targeted to resolving one specific contractual obstacle at the request of a constituent: BHOA. From these facts alone, a reasonable fact finder could infer that Wind P1 had no reasonable expectation of being blind-sided by a new regulation prohibiting operation of a plant in this manner. Summary judgment was inappropriate.

B. Plant Closure Order Was State Law within the Meaning of the Contracts Clauses

The Commission further argues (inconsistent with its arguments it was legislating under a "concurrent" constitutional authority) that it was merely acting

in an adjudicatory role here in administering existing legislative enactments, and therefore its action is not restrained by the Contracts Clauses. ACC Ans. at p. 48. The Commission's argument ignores that its plant closure order purported to establish a new retroactive zoning requirement for the WWTP that was not present in any existing laws or rules, and established a new method of enforcement not present in any existing law or rule. The new and binding nature of the Commission's order in this case was, (albeit unauthorized), akin to lawmaking or rulemaking (and similar to a municipal ordinance), both of which are subject to compliance with the Contracts Clause. *Jamaica Ash & Rubbish Removal Co., Inc. v. Ferguson,* 85 F.Supp.2d 174, 183 (E.D.N.Y. 2000); *see also Pure Wafer, Inc. v. City of Prescott,* 14 F.Supp.3d 1279, 1299 (D. Ariz. 2014) (municipal ordinance). The Commission's plant closure order here was hardly a mere ministerial act, and the Commission cannot avoid a finding that it is a new regulation simply because its effect is targeted to only one utility and one contract.

C. Superior Court Did Not Reach Last Two Tests for Contractual Impairment

Finally, even though the Superior Court never reached the final two prongs of the impairment analysis, the Commission argues about them. ACC Ans. at pp. 49–50. Whether or not the Commission could have demonstrated a significant and legitimate purpose for impairing Wind P1's contract, the Commission's action could not meet the third requirement of the constitutional contract impairment test

– that exercise of the Commission's power must be based upon reasonable conditions of a character appropriate to the public purpose justifying the Order's issuance. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 413, 103 S. Ct. 697, 74 L.Ed.2d 569 (1983); *Phelps Dodge*, 207 Ariz. 95, 119, 83 P.3d 573, 597 (App. 2004). Even though there is usually a presumption favoring legislative judgment as to the necessity and reasonableness of a particular measure, when legislation impairs an obligation in one specific existing contract, as in this case, there must be a demonstration in the record that the severe disruption of contractual expectations is necessary to meet an important general social problem. *See Allied Structural Steel Co. v. Spannus*, 438 U.S. 234, 244–45, 98 S.Ct. 2716, 2722–23 (1978); *see also U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 23, 97 S. Ct. 1505, 1518 (1977). This is a targeted order involving one facility and one contract even though odors are a well-known byproduct of all wastewater treatment plants, made outside the agency's legal authority, and despite a dearth of evidence that closure of the WWTP is either a necessary or reasonable remedy to meet an important general social problem.

REQUEST FOR ATTORNEYS' FEES AND COSTS

Plaintiff-Appellant Wind P1 requested that the Court, pursuant to A.R.S. §§ 12-341, 12-342, 12-348(A) and other applicable law, award Wind P1 its costs and reasonable attorneys' fees incurred in connection with this appeal and all related

actions. If Wind P1 is the prevailing party, then it is entitled to attorneys' fees pursuant to A.R.S. § 12-348(A)(2) (requiring court to award fees and other expenses to prevailing party under any statute authorizing judicial review of agency decision). The Commission incorrectly asserts application of an exception in A.R.S. § 12-348(H)(1), which excepts "a proceeding before this state . . . in which the role of the state . . . was to . . .fix a rate." The Commission in ordering the plant closure was not establishing or fixing a rate; the Commission is collaterally estopped from making this argument again. I.R. 143, Ex. 19 (August 26, 2013 Order in case number 1 CA-CC 13-0001, finding that "Decision No. 73885 did not arise from a process involving rate making or rate design").

The Commission further asserts that attorney's fees are not available under A.R.S. § 12-348(A)(2) for cases determined under a de novo standard of review. ACC Ans. at p. 52. The Commission does not cite any language in the statute, but relies instead on the holding in *Cyprus Bagdad Copper Corp. v. Ariz. Dept. of Revenue*. 188 Ariz. 345, 349, 933 P.2d 923, 927 (App. 1997). The *Cyprus* case was a tax appeal, and the court in that case found that attorneys' fees were not awardable under A.R.S. § 12-348(A)(2) because there was specific language addressing the recoverability of attorneys' fees awards for tax appeal cases in the same statute, at A.R.S. § 12-348(B) and (E). This is not a tax appeal, and the

legislature has not limited the recovery of fees and expenses in a case heard under A.R.S. § 40-254.

The Commission further argues that attorneys' fees would not be recoverable under A.R.S. § 12-348 against the Commission because it was involved in this matter only in its capacity as a forum. *See* A.R.S. § 12-348(H)(1). This argument is not supported by the case cited by the Commission. *See* ACC Ans. at p. 52, n.211. Once an agency takes an adversary role against the appellant's interests in an administrative appeal, it can no longer claim it is merely a forum or nominal party under A.R.S. § 12-348(H)(1). *Cortaro Water Users' Ass'n v. Steiner*, 148 Ariz. 314, 318, 714 P.2d 807, 811 (1986). In this case, the Commission has taken the lead in opposing Wind P1 in every step of the appeal.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant, Wind P1, respectfully requests that this Court:

- Reverse the Superior Court's decision granting summary judgment to the Commission, and remand this case with instructions to enter judgment in Wind P1's favor as a matter of law because the Commission lacked authority to issue the plant closure order; or, in the alternative:

- Reverse the Superior Court's decision granting summary judgment to the Commission because disputes of material fact exist that require a trial de novo per A.R.S. § 40-254; and
- Reverse the Superior Court's ruling that the Commission's plant closure order was not a "substantial impairment" of the Effluent Delivery Agreement under the Contract Clauses of the United States and Arizona Constitutions because disputes of material fact exist that require a trial de novo per A.R.S. § 40-254.

DATED this 27th day of February, 2015.

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